Supreme Court, U. S.
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Supreme Court of the United States

October 1975 Term

Docket No. 75-1750

AL DAYON, individually and on behalf of Mastercraft Electronics Corp.,

Appellant,

—against—

DOWNE COMMUNICATIONS, INC., THE AETNA CASUALTY and SURETY COMPANY and H. WILLIAM KEHL, as Sheriff of the City of New York,

Appellees.

On Appeal from the Court of Appeals for the State of New York

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT

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1 (a) OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

(1) SUPREME COURT, NEW YORK COUNTY

The New York State Supreme Court at Special Term Part I held in and for the Ccunty of New York rendered an opinion dated October 16, 1973 in its memorandum order dated October 16, 1973 on the separate motions by plaintiff Downe Communications, Inc. and by interpleaded defendant Sheriff of the City of New York, for summary judgment which were consolidated for disposition, and upon the cross-motion of interpleaded defendant Dayon for pre-trial oral deposition and upon the cross-motion of defendant and interpleading plaintiff Aetna Casualty and Surety Co. to deposit the amount of the attachment bond into court. That opinion was not reported, either officially or unofficially. The opinion is appended below, at pp. A4-A6. The said court also rendered an opinion dated January 15, 1974 on the motion by interpleaded defendant Dayon for renewal and reargument of opposition to the order of that court dated November 5, 1973 and entered November 8, 1973 which granted the separate motions for summary judgment of plaintiff Downe Communications, Inc. and of the interpleaded defendant Sheriff of the City of New York against defendant and interpleading plaintiff Aetna Casualty and Surety Co., as to liability only. That opinion was

not reported, either officially or unofficially. That opinion is appended below at pp. A6-A8.

(2) APPELLATE DIVISION FIRST DEPARTMENT

(a) The New York Supreme Court, Appellate Division, First Department did not render any opinion in affirming the aforesaid orders of the New York Supreme Court, Special Term Part I held in and for the County of New York. The order of the said Appellate Division entered June 18, 1974 in the office of the Clerk of the said Appellate Division was reported officially at 45 A.D.2d 823 (1st Dept. 1974). It was reported unofficially at 357 N.Y.S.2d 835 (2) (1st Dept. 1974).

(b) The said Appellate Division granted the motion of interpleaded defendant Dayon for leave to appeal to the New York Court of Appeals by order dated and entered September 17, 1974, without opinion. The said court granted the similar motion of defendant and interpleading plaintiff Aetna Casualty and Surety Co. for the same relief by order dated and entered September 17, 1974, without opinion.

(3) NEW YORK COURT OF APPEALS

(a) The New York Court of Appeals rendered an opinion dated October 30, 1975, on the appeal, which was reported officially at 37 N.Y.2d 903 (1975). It

was reported unofficially at 378 N.Y.S. 2d 379 (1975).

(b) The New York Court of Appeals did not render an opinion on the motion by interpleaded defendant Dayon for reargument of that appeal, but merely denied the motion by its order entered on February 24, 1976. This was reported officially at 38 N.Y.2d 938 (1976). It was reported unofficially at 382 N.Y.S. 2d ___ (1976).

1 (b) (i) JURISDICTION OF THIS COURT

The jurisdiction of this Court is involved pursuant to 28 U.S.C. Section 1257(2) because this is an appeal from a final order of the highest court of the State of New York which upheld the constitutionality of New York Civil Practice Law and Rules Section 8012, which had been challenged by appellant Dayon as being unconstitutional on its face and as applied, as being void for vagueness, and as depriving appellant of his constitutional rights to the due process of the law and to the equal protection of the law, which denied interpleaded defendant Dayon and defendant and interpleading plaintiff Aetna Casualty and Surety Co. due process of law and equal protection of law by granting summary judgment to plaintiff Downe Communications, Inc. upon a cause of action not pleaded and not proved, and which denied said Dayon and said Aetna Casualty and Surety Co. due process of law and equal

protection of law by denying each of them the right to defend the action upon the attachment bond by the plaintiff Downe Communications, Inc. and by the interpleaded defendant Sheriff of the City of New York upon the ground that the condition precedent for liability under the attachment bond had not occurred and had not been met, and on the ground that the order of the New York Supreme Court, Appellate Division, First Department entered February 13, 1973, appended below at pp. A19-21, which reversed three lower court orders which had sustained the Dayon order of attachment against Downe Communications, Inc., was void and that the said Appellate Division had acted beyond, outside of and in excess of its jurisdiction, contrary to the settled law of the State of New York and by assuming to exercise jurisdiction and power which had not been confided to that Appellate Division, or to any court, by New York law.

1 (b) (ii) DATE OF JUDGMENT TO BE REVIEWED, TIME OF ENTRY, DATE OF ORDER RESPECTING REHEARING, DATE OF AND COURT WHERE NOTICE OF APPEAL FILED

(a) DATE AND TIME OF ENTRY OF JUDGMENT TO BE REVIEWED

The final order of the New York State Court of Appeals which is sought to be reviewed was dated and entered in the office of the Clerk of the New York

State Court of Appeals on October 30, 1975.

(b) DATE AND TIME OF ENTRY OF ORDER ON REARGUMENT

The appellant Dayon duly and timely filed a motion for reargument thereof which was denied by the order of the New York State Court of Appeals dated and entered in the office of the Clerk of that court on February 24, 1976.

(c) DATE AND COURT NOTICE OF APPEAL FILED

The notice of appeal to this Court from the said final order of the New York State Court of Appeals was filed on March 19, 1976 in the office of the Clerk of the County of New York (City and State of New York).

1 (b) (iii) STATUTORY PROVISION BELIEVED TO CONFER ON THIS COURT JURISDICTION OF THE APPEAL

It is respectfully submitted that 28 U.S.C. Section 1257(2) confers on this Court jurisdiction of this appeal.

1 (b) (iv) CASES BELIEVED TO SUSTAIN THE JURISDICTION

The following cases are believed to sustain the jurisdiction: Daniels v. Tearney, 102 U.S. 415, 417-418 (1880); McPherson v. Blacker, 146 U.S. 1, 23-24

(1892); Fire Association of Philadelphia v. People of the State of New York, 119 U.S. 110, 114-117 (1886); Reed v. Reed, 404 U.S. 71 (1971); Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

1 (b) (v) TEXT OF STATE STATUTE WHOSE VALIDITY IS INVOLVED

The validity of the following New York State statutes, on their face and as construed and applied by the New York State Court of Appeals in this case, is involved:

1. 7B McKinney's Consolidated Laws of New York, Annotated, Civil Practice Law and Rules, Section 8012, entitled, "Mileage fees, poundage fees, additional compensations and limitation on compensation of sheriffs",

(a) Section 8012(b), entitled "Poundage fees", subdivision (1), at 1975-1976 Cumulative Annual Pocket Part, page 161:

> 1. A sheriff is entitled, for collecting money by virtue of an execution, an order of attachment, or an attachment for the payment of money in an action, or a warrant for the collection of money issued by the comptroller or by a county treasurer or by any agency of the state or a

> political subdivision thereof, or for collecting a fine by virtue of a commitment for civil contempt, to poundage of, in the counties within the city of New York, five per cent of the sum collected and in all other counties, five per cent upon the first two hundred fifty thousand dollars collected, and three per cent upon the residue of the sum collected.

(b) Section 8012(b), entitled "Poundate fees", subdivisions (2) and (3), at Main Volume, 1963 edition, page 303:

> 2. Where a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made. Where an execution is vacated or set aside, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the execution, and the court may order the party liable therefor to pay the same to the sheriff.
>
> 3. Where a settlement is made, either before or after judgment, after a levy by virtue of an order of attachment, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made.

Where an order of attachment is vacated or set aside, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the amount specified in the order of attachment, and the court may order the party at whose instance the order of attachment was granted to pay the same to the sheriff. Where an order of attachment is otherwise discharged by order of the court, the sheriff is entitled to the same poundage, to be paid by the party at whose instance the order of attachment is discharged, and the sheriff is entitled to retain the property levied upon until the poundage is paid. The maximum amount upon which poundage shall be computed, if such a settlement is made or the order of attachment is vacated or set aside, is one million dollars.

(c) Section 8012(c), entitled "Additional Compensation", at Main Volume, 1963 edition, page 303:

> A sheriff is entitled in any case, including an instance in which a mandate has been stayed, vacated or set aside, or a settlement has been made after a levy, to such additional compensation for his trouble and expenses in taking possession of and preserving property under any mandate or in removing a person in possession of real property and the

> said person's property, as the court allows, and the court may make an order requiring the party liable therefor to pay the same to the sheriff.

(d) Section 8012(d), entitled "Limitation on sheriff's compensation in foreclosure action", at Main Volume, 1963 edition, page 303:

> Where real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation shall not exceed fifty dollars.

2. 7B McKinney's Consolidated Laws of New York, Annotated, Civil Practice Law and Rules, Section 6214, entitled, "Levy upon personal property by service of order,"

(a) Section 6214(a), entitled "Method of Levy", at Main Volume, 1963 edition, pp. 78, 79:

> The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's possession or custody, in the same manner as a summons except that such service shall not be made by delivery of a copy to a

person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318.

(b) Section 6214(b), entitled "Effect of levy; prohibition of transfer", at Main Volume, 1963 edition, page 79:

A levy by service of an order of attachment upon a person other than the defendant is effective only if, at the time of service, he owes a debt to the defendant or he is in the possession or custody of property in which he knows or has reason to believe the defendant has an interest, or if the plaintiff has stated in a notice which shall be served with the order that a specified debt is owed by the person served to the defendant or that the defendant has an interest in specified property in the possession or custody of the person served. All property in which the defendant is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the defendant, shall be subject to the levy. The person served with the order shall forthwith transfer or deliver all such property, and pay all such

debts upon maturity, to the sheriff and execute any document necessary to effect the payment, transfer or delivery. After such payment, transfer or delivery, property coming into the possession or custody of the garnishee or debt incurred by him, shall not be subject to the levy. Until such payment, transfer or delivery is made, or until the expiration of ninety days after the service of the order of attachment upon him, or of such further time as is provided by any subsequent order of the court served upon him, whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court. A garnishee, however, may collect or redeem an instrument received by him for such purpose and he may sell or transfer in good faith property held as collateral or otherwise pursuant to pledge thereof or at the direction of any person other than the defendant authorized to direct sale or transfer, provided that the proceeds in which the defendant has an interest be retained subject to the levy. A plaintiff who has specified personal property or debt to be levied upon in a

notice served with an order of attachment shall be liable to the owner of the property or the person to whom the debt is owed, if other than the defendant, for any damages sustained by reason of the levy.

(c) Section 6214(c), entitled "Seizure by Sheriff", at 1975-1976 Cumulative Annual Pocket Part, page 40:

> Where property or debts have been levied upon by service of an order of attachment, the sheriff shall take into his actual custody all such property capable of delivery and shall collect and receive all such debts.

(d) Section 6214(d), entitled "Proceeding to compel payment or delivery", at Main Volume, 1963 edition, page 80:

> Where property or debts have been levied upon by service of an order of attachment, the plaintiff may commence a special proceeding against the garnishee served with the order to compel the payment, delivery or transfer to the sheriff of such property or debts, or to secure a judgment against the garnishee. Notice of petition shall also be served upon the sheriff. A garnishee may interpose any defense or counterclaim which he might have interposed against the defendant if sued by him. The court may permit

> any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 6221.

(e) Section 6214(e), entitled "Failure to Proceed", at Main Volume, 1963 edition, page 80:

> At the expiration of ninety days after a levy is made by service of the order of attachment, or of such further time as the court, upon motion of the plaintiff, has provided, the levy shall be void except as to property or debts which the sheriff has taken into his actual custody, collected or received or as to which a proceeding under subdivision (d) has been commenced.

1 (c) QUESTIONS PRESENTED BY THE APPEAL

The following are the questions presented by the appeal:

1. Is New York Civil Practice Law and Rules Section 8012 unconstitutional on its face and as applied by the New York Court of Appeals?

2. Is New York Civil Practice Law and Rules Section 6214 unconstitutional on its face and as applied by the New York Court of Appeals?

3. Does the order on appeal

deprive the appellant of due process of law and equal protection of the law?

4. Is a party deprived of its constitutional right to due process of law and equal protection of the law when the Court does not allow the surety the right to litigate the very issue upon which its liability depends under an attachment bond issued by it in a separate action on the bond by the former attachment defendant and does not consider or review the jurisdictional invalidity of the order which vacated the order of attachment in the attachment action to which the surety was not a party, ~~and does not consider or review the jurisdictional invalidity of the order which vacated the order of attachment in the attachment action to which the surety was not a party,~~ but upon which the former attachment defendant relied as the basis for liability of the surety in its action against the surety?

5. Under New York statutes where a former attachment defendant has brought an action for damages against the attachment bond surety on the attachment bond, is there subject matter jurisdiction for an "interpleader" complaint by the attachment bond surety against the former attachment plaintiff who makes no claim against the surety

under the attachment bond, or against the Sheriff of the City of New York whose claim for poundage fees is covered by a distinctly separate amount and separate provision of the attachment bond from that which covers and relates to the former attachment defendant, and no part of either amount or coverage of the attachment bond overlaps the other, so that the surety does not face any conflicting claim by either the former attachment defendant or the Sheriff of the City of New York under the attachment bond, and does the allowance of interpleader and the grant of summary judgment for interpleader in favor of the surety by the highest court of the State of New York violate appellant's constitutional rights?

6. Is the appellant deprived of due process of law and equal protection of the laws by the order on appeal which grants summary judgment to the plaintiff upon a complaint that is insufficient on its face and upon a cause of action not pleaded?

1 (d) STATEMENT OF THE CASE

I. The Dayon Attachment action against DCI, and others.

A. The Dayon Order of Attachment

On August 14, 1972, in the New York

Supreme Court held in and for Bronx County, Al Dayon, individually and on behalf of Mastercraft Electronics Corp., as plaintiff in an action against Downe Communications, Inc., and others, as defendants, applied to that court, ex parte, at Special Term Part II, as authorized by New York Civil Practice Law and Rules, hereinafter, NYCPLR, Section 6211 ("An order of attachment may be granted without notice, before or after the service of summons and at any time prior to judgment.") for an order of attachment in the amount of Two Million ($2,000,000.00) Dollars against the property of defendant Downe Communications, Inc., hereinafter DCI, and defendant Edward R. Downe, Jr. The application for that order of attachment by plaintiff Al Dayon, individually and on behalf of Mastercraft Electronics Corp., hereinafter Dayon, was supported by the affidavit of Dayon sworn to August 11, 1972 and by his complaint, verified August 11, 1972, which on such application is deemed an affidavit under NYCPLR 105(q), (A verified pleading may be utilized as an affidavit whenever the latter is required.), at that time. [Renumbered by L. 1974 c. 924, effective September 1, 1974 as NYCPLR 105(s).]

The affidavit of Dayon sworn to August 11, 1972 alleged on his own knowledge that attachment defendant DCI was a foreign corporation. That fact was conceded by DCI and was never disputed. DCI was and is a Delaware corporation. That

fact established a ground for the granting of an order of attachment, and satisfied NYCPLR 6201(1). Dayon further alleged: that on December 26, 1968 Mastercraft Electronics Corp., hereinafter Mastercraft, entered into a written agreement with DCI whereby DCI agreed to sell to Mastercraft $2,000,000.00 of advertising space in any magazines owned or controlled by DCI, which included The Ladies Home Journal, American Home, and Family Weekly, which were represented to have a combined circulation of some 18,000,000 readers, to be paid by Mastercraft delivering 933,333 shares of unregistered common stock; that Mastercraft then had 7,000,000 shares of common stock issued and outstanding; that Dayon owned 3,278,000 shares of that stock; that the Mastercraft stock in 1968-1969 traded in the over the counter market over a range of $4.00 to $9.00 per share; that Mastercraft duly paid in full to DCI the said purchase price for the $2,000,000.00 of advertising space by delivering the said 933,333 shares of Mastercraft common stock to DCI; that thereafter DCI delivered approximately $250,000.00 of advertising space and then refused to furnish and deliver any more advertising space to Mastercraft and by letter from DCI to Mastercraft dated June 4, 1970, DCI declared its refusal to perform the December 26, 1969 contract further, that a copy of the contract dated December 26, 1969 and of the said letter dated June 4, 1970 was attached to the said affidavit of Dayon;

that in January, 1970 defendant Edward R. Downe spoke to Dayon and told him that he wanted DCI to take over Mastercraft by taking over the 3,278,000 shares of common stock in Mastercraft owned by Dayon in exchange for which Dayon would receive one share of stock of the merged corporation for every five shares of Mastercraft stock, that defendants Edward R. Downe, Jr. and DCI, and other named defendants, represented that they wanted to effect a merger of Alexander Sales Corp., a mail order house, and Mastercraft, which was a successful importer, and contract manufacturer, using Japanese and other manufacturers to produce radios, digital clocks, tape recorders, phonographs and other electronic and household goods; that Dayon told defendant Edward R. Down, Jr. that he was not interested; that after some ten or twelve conversations whereby defendant Edward R. Downe, Jr. unsuccessfully sought to have Dayon turn over his said shares in Mastercraft to DCI, as aforesaid, that in February, 1970, after the last meeting with defendant Edward R. Downe, Jr., that Dayon was called over to the office of defendant Irwin Natov, who was an officer of Chemical Bank and Chairman of the Board of L. F. Dommerich Co., Inc.; that when Dayon arrived, defendant Joseph O. Barlow was present with defendant Natov; that they both spoke to Dayon about the deal offered to Dayon by defendant Edward R. Downe, Jr.; that defendants Natov and Barlow told Dayon that they were there to tell him

to take the deal that Mr. Downe had offered; that Dayon told them that if he did, that it would be "stealing my Company and I don't want to give it up," that "I don't like the deal"; that the defendants Natov and Barlow told Dayon that he has no choice, that they were instructed to tell him from higher ups at the bank that unless he takes the deal, that Mastercraft would get no money to meet payroll or for any other reason; that they would also go after Dayon personally for the obligations of Mastercraft to defendant L. F. Dommerich Co., Inc. was the factor for Mastercraft and controlled its money and receivables; that a failure to receive money from defendant L. F. Dommerich Co., Inc. would put Mastercraft out of business and result in loss of jobs, losses to stockholders and other irrevocable damage; that on February 19, 1970 Dayon entered into a written agreement, a copy of which was physically attached, with DCI whereby Dayon signed over to DCI all of his 3,278,000 shares of common stock in Mastercraft, a copy of which was attached, signed an irrevocable proxy statement to DCI as to his said shares in Mastercraft, a copy of which was attached, signed a form resigning as Chairman of the Board of Directors of Mastercraft, a copy of which was attached; that by that agreement dated February 19, 1970 that DCI agreed to merge Alexander Sales Corp. and Mastercraft and return to Dayon one share in the merged corporation for every five shares

in Mastercraft; that in fact DCI never intended to merge Alexander Sales Corp. and Mastercraft; and DCI never delivered any shares of the "merged corporation" to Dayon; that no merger was ever effected; that immediately after DCI received the 3,278,000 Dayon shares of Mastercraft stock, that DCI installed a new Board of Directors, immediately physically removed and excluded Dayon from the offices of Mastercraft, changed the locks to Mastercraft offices, took actual possession and control of Mastercraft offices, warehouse, assets, property, inventory, accounts receivables, everything, lock, stock and barrel, which included some $500,000.00 of merchandise in the Mastercraft warehouse, $300,000.00 of accounts receivables, plus office equipment, industrial molds, and business machines, and a video tape recorder in the process of development; that these properties were distributed among DCI, and others; and that thereafter on June 4, 1970, after having acquired full control and possession of Mastercraft, that DCI sent the aforesaid letter to Mastercraft declaring that it would not further perform the $2,000,000.00 December 26, 1968 advertising contract; that aggregate total damages of $240,000,000.00, allotted specifically and appropriately as to plaintiff Dayon individually and as to plaintiff Dayon, derivatively on behalf of Mastercraft.

B. The Dayon Attachment Complaint

In addition to this affidavit of Dayon, Dayon had submitted in support of his application for the order of attachment his said complaint, verified August 11, 1972. The said complaint alleged facts in six separate causes of action, showing, to wit, one cause of action against DCI for breach of contract against DCI by Dayon individually as to the February 19, 1970 agreement, a copy of all the documents of which were duly attached; one cause of action against DCI for breach of contract by Dayon derivatively on behalf of Mastercraft, as to the December 26, 1968 agreement, a copy of all the documents of which were duly attached; one cause of action against DCI and other defendants for fraud and misrepresentation in contracting with Mastercraft and inducing Mastercraft to deliver 933,333 shares of Mastercraft to DCI for the purchase of $2,000,000.00 of DCI advertising space knowing that DCI had no intention to perform that contract, but simply to acquire the stock of Mastercraft so as to use its value to inflate and manipulate its own balance sheet and the price of DCI stock on the stock market, thereby benefit itself from an increase in the price of its stock, and enable defendant Edward R. Downe, Jr. to personally benefit from the increased manipulated price of DCI stock by selling shares of DCI owned by him on the market in secondary offerings; one cause of action for fraud and misrepresentation in contracting with Dayon individually as to the

February 19, 1970 agreement whereby Dayon was compelled to turn over his 3,278,000 shares of Mastercraft stock to DCI enabling DCI and others to benefit as aforesaid and to take actual control and possession of Mastercraft and its assets and property, evade the delivery of performance by DCI to Mastercraft on the advertising contract dated December 26, 1968, and put Mastercraft out of business; and one cause of action against DCI and others for misappropriation and waste of the specified property and assets of Mastercraft for their own benefit.

C. The Aetna attachment bond filed in the Dayon attachment action against DCI

On August 14, 1972, the said New York Supreme Court, Bronx County at Special Term Part II, granted attachment plaintiff Dayon's application for an order of attachment against attachment defendants DCI and Edward R. Downe, Jr.

On September 22, 1972 an attachment bond number 71-S-4466 was issued by The Aetna Casualty and Surety Company in the aforesaid attachment action on behalf of attachment plaintiff Dayon, pursuant to NYCPL 6212(b), as follows:

UNDERTAKING ON ATTACHMENT

THE AETNA CASUALTY AND SURETY COMPANY
Hartford, Connecticut 06115

SUPREME COURT : COUNTY OF BRONX

- - - - - - - - - - - - - - - - - - - -

AL DAYON, Individually and on behalf of MASTER-CRAFT ELECTRONICS CORP.,

Plaintiffs

-against-

DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., THE CHEMICAL BANK, L. F. DOMMERICH CO., INC. JOSEPH O. BARLOW, IRWIN NATOV, ERIC H. JAVITS, REGAL ADVERTISING ASSOCIATES CORP., CAMPBELL-REYNOLDS, INC., ALEXANDER SALES CORPORATION, JOHN DOE, RICHARD ROE and RICHARD ROE, INC., The Last Three names being fictitious, the true names being presently unknown,

Defendants.

- - - - - - - - - - - - - - - - - - - -

Civil Practice Law & Rules
Section 6212

Index No. 15225/72

Bond No. 71 S 4466

The above named Plaintiffs having applied to one of the Justices of this Court, for an order of attachment against the property of the above named Defendants, DOWNE COMMUNICATIONS, INC. and EDWARD R. DOWNE, JR. under and by virtue of the provisions of the Civil Practice

Law & Rules.
NOW, THEREFORE, THE AETNA CASUALTY AND SURETY COMPANY, of Hartford, Connecticut, having an office and usual place of business at 151 William Street, New York, New York, does hereby undertake in the sum of ONE HUNDRED THOUSAND AND 00/100 ($100,000.00)- - - DOLLARS of which amount the sum of FIFTY THOUSAND AND 00/100 ($50,000.00)- - - - - - - - - - DOLLARS is conditioned that the Plaintiffs will pay to the Defendants DOWNE COMMUNICATIONS, INC. and EDWARD R. DOWNE, JR. all legal costs and damages which may be sustained by reason of the attachment if the Defendants DOWNE COMMUNICATIONS, INC. and EDWARD R. DOWNE, JR. recovers judgment or it is finally decided that the Plaintiffs was not entitled to an attachment of the Defendants DOWNE COMMUNICATIONS, INC. and EDWARD R. DOWNE, JR. property, and the balance of FIFTY THOUSAND AND 00/100 ($50,000.00) - - DOLLARS conditioned that the Plaintiffs will pay to the Sheriff all of his allowable fees.

Dated September 22nd, 1972.

THE AETNA CASUALTY AND
SURETY COMPANY

By C. M. PICIULLO
C. M. Piciullo,
Attorney-in-Fact

The said attachment bond was thereafter duly filed in the office of the Clerk of the New York Supreme Court, Bronx County.

On October 17, 1972 the order of attachment was delivered on behalf of attachment plaintiff to the Sheriff of the City of New York, County of New York with instructions to levy only upon property or debts of DCI. On October 19, 1972 the said Sheriff served a copy of the order of attachment on First National City Bank, and on October 20, 1972 the Sheriff served another copy of the order of attachment on Bank of New York. Thereafter, the Sheriff did nothing. That was totality f what the Sheriff did. The Sheriff never seized any property of DCI and never collected any money of DCI, or any money which was due to DCI from any garnishee.

D. Motions by DCI to vacate the Dayon attachment bond.

DCI made three motions to vacate the Dayon order of attachment in this attachment action, one by order to show cause dated October 24, 1972, the second by order to show cause dated October 30, 1972, and the third by order to show cause dated November 27, 1972, each one returnable at New York Supreme Court, Bronx County, at Special Term Part I. In support of the order of attachment and in opposition to the first two motions of DCI to vacate the order of

attachment, Dayon filed additional affidavits and affirmations setting forth additional facts, including information from DCI's own stock offering prospectus dated July 25, 1972 which established that DCI had no property in the State of New York and that whatever assets it had were mortgaged, pledged and assigned to two banks for loans as to which it was in default and that its own balance sheet on the best view showed a deficit of $2,171,000.00, an excess of liabilities over assets.

E. The DCI stock offering Prospectus dated July 25, 1974

A prospectus issued by DCI dated July 25, 1972 in connection with a large secondary offering of stock of DCI owned by Edward R. Downe, Jr. and other insiders to the public was introduced in evidence. That prospectus established that attachment defendant DCI had no property in the State of New York, that it was a stockholding company, that all of the stock in other corporations which DCI owned had been pledged, mortgaged and assigned to First National City Bank and Bank of New York in connection with large multimillion loans to DCI by those banks, that DCI was in default on those loans and under the loan agreement, that DCI's own balance sheet and report of financial condition in its own prospectus showed, as reported by a qualified certified public account, Mr. Leonard R. Bailin, in his affirmation dated

October 30, 1972, that its liabilities exceeded its assets by $2,171,000.00, "its inventories, receivables and prepaid items are realizable in full", which is rarely the case. The DCI prospectus dated July 25, 1972 showed that as late as March 31, 1972, DCI has no cash, and that DCI was overdrawn to the amount of $2,125,332.00, that DCI had not paid a single dividend since it was organized in 1967; that the prospectus reported a decrease in earnings and a projected continuation of this downward trend; that while the prospectus had valued the DCI held 40% of Bartell Media Corporation stock at $8,979,668.00, DCI's own accountant reported in his affidavit that the market value of that holding (which was totally pledged, mortgaged and assigned to the aforesaid banks) was "three million dollars"; that by mere chance, one of DCI's controlled corporations had completed a sale of a radio station located in another state and had received a large amount of money, which under its loan agreement was to be applied to the bank loan, was in the First National City Bank, to the amount of some $700,000.00; there was also some $335,000.00 in Bank of New York.

F. Denial by New York Supreme Court, Bronx County of all three motions to vacate Dayon order of attachment

The New York Supreme Court, Bronx

County, Special Term Part I denied all three motions of DCI to vacate the Dayon order of attachment. The opinion of the said court as to the first two motions was dated November 30, 1972 (Appendix pp. A8-A14). Its decision on the third motion by DCI was dated December 12, 1972 (Appendix pp. A15-A16).

G. Appeal by DCI to Appellate Division

Attachment defendant DCI and defendant Edward R. Downe, Jr. appealed to the New York Supreme Court, Appellate Division from the order denying the first two motions, each dated and entered November 30, 1972, and from the order denying the third motion, dated and entered December 12, 1972.

H. Vacatur of Dayon Order of Attachment by Appellate Division

The said Appellate Division reversed the Special Term orders and vacated the Dayon order of attachment by order dated and entered February 13, 1973 (Appendix pp. A19-A21), which was based on its memorandum opinion dated February 13, 1973 (Appendix pp. A16-A19).

The said Appellate Division vacated the Dayon order of attachment for the reason that "the four first causes of action alleged in the complaint are patently deficient." Whether the complaint, as a whole, or as to the first

four causes of action pleaded, was "patently insufficient" as a pleading, or not, is totally irrelevant and immaterial to the issue of whether the order of attachment was validly issued and whether it complied with NYCPLR 6201, 6212(a) and 6223. The settled law of the State of New York is that a complaint as a pleading is totally unnecessary to an application for an order of attachment and to any issue on a motion to vacate the order of attachment. That order was illegal, void and arbitrary and an exercise of jurisdiction and power by that court where none had been confided, by any statute or case law.

The Appellate Division stated in its memorandum opinion (Appendix pp. A16-A19):

> Furthermore there is grave doubt as to whether an attachment is needed to secure plaintiff. . .

It did not explain that statement. The undisputed facts before that court was that DCI owned no property in the State of New York, that whatever stocks in other corporations that it had owned, it had pledged, mortgaged and assigned to First National City Bank and Bank of New York under a loan agreement under which it was in default, and that its own prospectus established that its liabilities exceeded its assets. Under the settled law of the State of New York the

jurisdiction and power of a court to vacate an order of attachment on that ground is raised under NYCPLR 6223 only if the court should make a finding in haec verba that the attachment was "unnecessary to the security of the plaintiff." George A. Fuller Co. v. Vitro Corp., 26 A.D.2d 916 (1st Dept. 1969). Such an issue could only be considered in the case where the order of attachment was properly issued, that is, that the plaintiff was entitled to the order of attachment. Hydromar Corp., etc., v. Construction Aggregates, etc., 32 A.D.2d 749 (1st Dept. 1969).

It is the settled law of the State of New York since the first statute authorizing attachments that a warrant of attachment or an order of attachment issues upon an affidavit or affidavits, stating facts showing at least one ground as defined on Statute, and showing at least one cause of action prima facie against an attachment defendant of a type authorized by that attachment statute. In the Dayon attachment action, the order of the Appellate Division entered February 13, 1973 vacating the order of attachment, on the grounds stated by the Appellate Division, was beyond the power and jurisdiction of the court and was not authorized by NYCPLR 6223, 6201, or 6212(a). It was not a mere error in the construction of a state statute by a court acting within its jurisdiction, Arrowsmith v. Harmoning, 118 U.S. 194 (1885), but of an

order by a court acting beyond the law and outside of its jurisdiction in the case. Ex Parte Virginia, 100 U.S. 339. See below, page 53 . The said Appellate Division memorandum and the order entered February 13, 1973 did not find and did not hold that plaintiff Dayon "was not entitled to the order of attachment."

The Appellate Division did not hold that the lower courts had abused their discretion in granting the order of attachment or in denying the three motions by DCI to vacate the Dayon order of attachment. It did not hold that the facts alleged in the affidavits in support of the order of attachment showed that the plaintiff Dayon "must ultimately be defeated." American Reserve Insurance Co. v. China Ins. Co., 297 N.Y. 322, 325 (1948); See, Carey v. Best Randolph Sugar and Wrestling Revue, Inc., etc., ____ U.S. ___ , 96 S. Ct. 1208, 1210 (1976), re grounds for attachment under NYCPLR 6201(5) and (8). The attachment defendant conceded and admitted that it was a foreign corporation; it did not raise any challenge or objection whatever to the fact that NYCPLR 6201(1) was satisfied as to grounds for the order of attachment. DCI admitted that plaintiff Dayon had alleged facts showing a cause of action for breach of contract derivatively on behalf of Mastercraft for breach of the written contract dated December 26, 1968 which breach was evidenced by the letter from DCI dated June

6, 1970 expressly renouncing the contract and refusing to render further performance thereunder to deliver advertising space to Mastercraft, and that Dayon individually had alleged a breach of contract of the written contract dated February 17, 1970. DCI argued that it was not guilty of fraud.

I. Denial of leave to Appeal order of Appellate Division dated February 13, 1973 to New York Court of Appeals

Dayon immediately served a notice of appeal from that order of the Appellate Division and applied to Chief Judge Stanley J. Fuld of the New York Court of Appeals for a stay of the Appellate Division order entered February 13, 1973 (which vacated the order of attachment). Chief Judge Fuld ruled that he had no jurisdiction to grant the request because that order of the Appellate Division was not a final order and was therefore not appealable as of right to that Court of Appeals. Immediate application was made to the Appellate Division for leave to appeal to the Court of Appeals from its said order entered February 13, 1973 which vacated the order of attachment. The Appellate Division denied Dayon leave to appeal to the Court of Appeals by order entered February 21, 1973.

II. The present DCI action against Aetna on the Dayon attachment bond

A. DCI Complaint

On April 6, 1973, DCI commenced this action against Aetna upon the attachment bond issued by it in the Dayon attachment action to recover alleged legal costs and damages. The basis of the DCI complaint was the allegation that the Dayon order of attachment was vacated. The complaint did not allege that Dayon "was not entitled to the order of attachment," which was the condition thereof, nor did it allege that the Appellate Division, in vacating the order of attachment, had held or had found that Dayon "was not entitled to the order of attachment"; the Appellate Division had not made any such a finding or holding. See above, pp. 28-32.

B. Aetna Answer, Complaint, Counterclaim and Interpleader

On May 14, 1973, Aetna served its answer denying knowledge or information sufficient to form a belief as to the allegations made by DCI, counterclaimed alleging that it was holding "in excess of $50,000.00" in cash collateral deposited with it, which is no part of the provisions of the attachment bond in Dayon attachment action, that it was willing to pay that collateral to whomever the Court directs, and served a so-called interpleading complaint against Dayon and the Sheriff, alleging that it should be relieved of all liability to Dayon, DCI and the Sheriff

under the attachment bond on depositing in court the said money. [The collateral does not belong to Dayon. It belongs to Merco Properties, Inc., as to which Dayon has no connection whatever and never had. Dayon was obliged to give up a part of his expected right of recovery against Downe in order to meet the collateral requirements of Aetna before it would issue the attachment bond. The collateral was posted by Merco Properties, Inc. by separate arrangements between it and Aetna.] The collateral, of course, formed no part of the attachment bond filed in the Dayon attachment action. DCI and the Sheriff were total strangers as to that collateral. Neither DCI nor the Sheriff made any claim whatever against the collateral. Aetna alleged that Dayon contends that it has not been finally determined that Dayon was not entitled to the order of attachment, and that the Sheriff is not entitled to poundage by reason of the vacatur of the attachment, and that Aetna does not know whether Dayon's contentions or DCI's claim, or the Sheriff's claim, is correct, and that Aetna alleged its willingness to deposit into Court the $100,000.00 cash collateral. The claims by DCI and the Sheriff, against Aetna, however, are based solely upon the $100,000.00 attachment bond as issued by Aetna, which provided for a separate and distinct claim by DCI against that bond as to the $50,000.00 portion of the $100,000.00 bond which was stated in the bond to answer for DCI

"legal costs and damages," on the condition that "if it is finally decided that the plaintiffs (sic) was not entitled to an attachment of the defendants Downe Communications, Inc. and Edward R. Downe, Jr. property," and for a separate and distinct claim by the Sheriff against that bond as to the other $50,000.00 portion of the $100,000.00 bond which was stated in the bond to "pay to the Sheriff all of his allowable fees"

C. Answer and Counterclaim of Sheriff

On July 2, 1973 the Sheriff served his answer to the Aetna interpleading complaint which included the allegation of an alleged "counterclaim" against Aetna and a so-called cross claim against Dayon for $50,000.00 for alleged "statutory poundage pursuant to law." The so-called counterclaim by the Sheriff consisted in the main of the Sheriff alleging that he "repeats and reiterates the allegations of the complaint of Downe Communications, Inc. numbered 2 to 14, inclusive as if fully set forth at length." That referred to the DCI complaint allegations that Dayon had secured an order of attachment dated August 14, 1972 in the principal amount of $2,000,000.00 against DCI and Edward R. Downe, Jr., that pursuant thereto an attachment bond in the principal amount of $100,000.00 was filed by Aetna, copy attached, that "Dayon caused levies to be

made by the Sheriff upon bank accounts maintained by DCI in the County of New York at the Bank of New York and First National City Bank where $4,000,000.00 in assets were attached pursuant to said levies," that the Dayon order of attachment was "vacated" by the order of the Appellate Division entered February 13, 1973.

D. Reply of DCI

On July 5, 1973, DCI served its reply to the Aetna counterclaim which "denied knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs Fourth, Fifth, Sixth, Seventh, Eighth and Ninth of the counterclaim." Paragraph Fourth of the Aetna counterclaim alleged that Aetna's undertaking "in effect guaranteed payment of all legal costs and damages incurred by DCI and Downe in an amount not exceeding $50,000.00 if judgment were recovered by DCI or Downe or if it were finally determined that Dayon was not entitled to an attachment in an action in Supreme Court, Bronx County wherein Al Dayon, individually and on behalf of Mastercraft Electronics Corp. was plaintiff and DCI, Downe and others were defendants"; paragraph Fifth alleged that "Aetna's undertaking also in effect guaranteed that the Sheriff's allowable fees not in excess of $50,000.00 would be paid"; paragraph Sixth alleged that "the complaint (of DCI) herein alleges

in substance and effect that it has been finally determined in the aforementioned Bronx County action that Dayon was not entitled to an attachment and plaintiff (DCI) demands judgment against Aetna for $50,000.00 with interest thereon from February 27, 1973. A copy of the complaint is annexed as Exhibit A." It is notable that DCI denied "knowledge or information sufficient to form a belief as to the truth of the allegations contained" in this Sixth paragraph, as well as the Fourth, Fifth, Seventh, Eighth and Ninth paragraphs of the counterclaim. The meaning of this denial is that DCI denies that the condition of the bond has occurred.

E. Answer of Dayon

On July 11, 1973 Dayon served his answer to the Aetna "interpleading complaint" and his answer to the DCI complaint against Aetna.

F. Reply of Aetna

On July 20, 1973 Aetna served its reply to the Sheriff's counterclaim.

G. DCI motion for summary judgment.

On July 5, 1973 DCI served its notice of motion for summary judgment against Aetna, returnable July 24, 1973.

H. Aetna motion for summary

judgment

On July 13, 1973 Aetna served its notice of motion for an order to permit it "to pay this court the sum of $100,000, the amount in dispute in this action and the total penal sum of an undertaking on attachment issued by Aetna. . . discharging. . .Aetna. . .from all liability in whole to any party to this action, directing payment to. . .Aetna. . .of its costs, expenses and disbursements and charging the same against said amount in dispute in this action. . ." Aetna filed an affidavit by its attorney William P. Sullivan, Jr. sworn to July 13, 1973 which averred that "Aetna genuinely lacks knowledge of the facts alleged in the moving affidavit of Francis A. Loughlin" and that "summary judgment must be denied."

I. Sheriff's motion for summary judgment

On July 12, 1973 the Sheriff moved for summary judgment against Aetna upon the attachment bond for the sum of $50,000.00, claimed as "statutory poundage." The Sheriff contended that his right to "poundage" in the amount of $50,000.00 under NYCPLR 8012(b)(3) arose when the order of attachment dated August 14, 1973 was vacated by the order of the Appellate Division entered February 13, 1973 in the Dayon attachment action, by reason of his service of a copy of an order of attachment on First

National City Bank on October 18, 1972, and by reason that the affidavit of Francis A. Loughlin, sworn to July 5, 1973 had attached thereto a letter from that bank dated December 4, 1972 which stated that the levy "had reached" cash deposits in excess of $2,500,000.00.

III. Issues Presented

A. New York CPLR 8012, and in particular New York CPLR 8012(b)(3), supra, pp. 6-10 , is unconstitutional on its face and as applied and construed by the New York Court of Appeals in this case. The statute is void for vagueness, and deprives Dayon of his constitutional rights to due process of law and equal protection of the law.

1. Validity of statute drawn in question as denial of federal constitutional rights.

a. Issue raised in state court of first instance.

Dayon drew in question the federal constitutional validity of NYCPLR 8012 (b)(3), in the New York Supreme Court, County of New York, Special Term Part I, the court of first instance, on Dayon's motion to renew and reargue his opposition to the separate motions for summary judgment made by DCI and by the Sheriff, in the affirmation of Charles Sutton dated November 30, 1972 at pars. 9-12, 29, and in the affirmation of Charles

Sutton dated December 12, 1972 at paragraph 50.

b. Issue raised in intermediate appellate state court

Dayon raised this federal question also in the New York Supreme Court, Appellate Division First Department in his brief on appeal from the orders of first instance, at page 2, which repeats the statements made in the court of first instance, in substance, at page 8, wherein Dayon states that:

> . . .the statute does not set forth any fee to be charged in the situation recited by the statute,

at page 9, wherein Dayon states that:

> It is respectfully submitted that since the statute is silent as to a fee under CPLR 8012(b)(3), the imposition of any fee would constitute the taking of defendant's property without authority of law, and in violation of defendant's constitutional rights to due process of law and to the equal protection of the laws.
>
> The statute does not provide the court with any standard in CPLR 8012 (b)(3) to impose or calculate any fee, and it does not authorize the court to create its own standard or any standard to calculate or impose any fee at all,

at page 13, wherein Dayon states:

> Point IV The judgment violates defendant's and interpleading defendant's constitutional rights.
>
> * * *
>
> CPLR 8011(a)(1) sets the sheriff's fee for levying an attachment at $10.00. There is no provision in the CPLR authorizing the sheriff to have a second fee for the same service.

c. Issue raised in highest appellate state court

Dayon raised this federal question also in the New York Court of Appeals in his brief on appeal at p. iv wherein Dayon states that:

> . . .CPLR 8012(b)(3) is unconstitutional on its face and in its application. . .,

at page 44, wherein Dayon states at Point 11:

> CPLR 8012(b)(3) is unconstitutional on its face and in its application,

at page 63, wherein Dayon repeats in substance the arguments that CPLR 8012 (b)(3) is void for vagueness, and at pp. 64, 65, wherein Dayon repeats what was stated at page 13, supra.

Dayon raised this federal question also in the New York Court of Appeals in his brief on Reargument at pp. 16, 17.

d. Issue passed on by state courts

The federal issue that the validity of CPLR 8012(b)(3) was drawn into question was passed on by the state court of first instance (Appendix pp.A4 - A6) and the highest appellate state court (Appendix pp. A1 - A4). The intermediate appellate state court rendered no opinion; however it granted leave to appeal to the New York Court of Appeals on the certified question "was the order of this Court properly made?", by its order entered September 17, 1974. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Chambers v. Mississippi, 410 U.S. 284; Dahnke-Walker v. Bondurant, 257 U.S. 282 (1921); Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Street v. New York, 394 U.S. 576 (1969); Chicago, R. I. & P. R. Co. v. Perry, 259 U.S. 548 (1921). This Court in Bryant v. Zimmerman, supra, held:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.

New York CPLR 8012(b)(3) is unconstitutional in that it is vague. The statute does not fix any amount of fee, nor does it set forth any percentage or standard by which a fee, or poundage "upon the value of the property levied upon" can be computed.

2. Substantiality of issue raised

The statute does not authorize the court to adopt the rate fixed in any other provision of NYCPLR 8012, such as NYCPLR 8012(b)(1), and it does not authorize the court to set its own standard or measure for the calculation of the sheriff's fee in that described situation.

The term "poundage" has no dollar or percentage meaning at all, and never had. It is simply another word for the

general description of "sheriff's fees" or "charges for his services." Flack v. State, 95 N.Y. 461, 464 (1895). At common law the sheriff was not entitled to any fee for the execution of orders or judgments and the like, and the sheriff obtained money in thos early days by the practice of extorting it from the attachment defendant, or other defendant, or from both parties. Campbell v. Cothran, 56 N.Y. 279 (1874); Flack v. State, 95 N.Y. 461 (1894). "Poundage", or fees to the sheriff, was unknown at common law. The word poundage arose from the reference to the amount of pence in each hundred pounds which the sheriff was authorized to charge by statute enacted first by 29 Eliz. chapter 4, as a means to halt the sheriff's practice of extortion. Campbell v. Cothran, supra; Flack v. State, supra. Sheriff's fees, namely sheriff's fees on attachment proceedings, are purely a creature of statute. Campbell v. Cothran, supra; Flack v. State, supra; Personeri v. Aquino, 6 N.Y.2d 35, 37 (1959). Sheriff's fees statutes are in derogation of the common law and must be strictly construed. Personeri v. Aquino, supra; Stojowski v. Banque de France, 294 N.Y. 135 (1945); Crofut v. Brandt, 58 N.Y. 106 (1874); German American Bank v. Morris Run Coal Co., 68 N.Y. 585 (1876).

> The sheriff in making a levy under a warrant of attachment exercises a governmental function conferred upon

> him by the state (Finn v. City of New York, 282 N.Y. 153, 25 N.E.2d 966, 127 A.L.R. 522) and the fees payable for the exercise of the function belong not to him, but to the city as a governmental agency . . . Stojowski v. Banque de France, 294 N.Y. 135, 145 (1945).

The purpose of the attachment statutes is "for the benefit of the attaching creditor alone. Penoyar v. Kelsey, 150 N.Y. 77, 34 A.L.R. 248. . . to obtain possession of and hold the debtor's property untilthe recovery and thereby prevent him from disposing of it so as to defeat the object of the action in which it is granted. Stone v. Pratt, 90 Hun. 39, 35 N.Y.S. 519; Sartwell v. Field, 68 N.Y. 341. . .so as to secure the claim. . .with the object. . .to conserve (the property) for eventual execution." 10 Carmody-Wait, Cyclopedia of New York Practice, (1963 Reprint), Sections 29, 31, 32; also, Finn, The Streamlining of the Attachment Procedure, 9 Fordham L. Rev. 1-3 (1940); New York State Legislative Reports: Recommendations Relating to Attachment, The Judicial Council, 7th Annual Report and Studies, (1941), pp. 391-394. On the other hand, the purpose of the statutes fixing the fees to which a sheriff is "entitled" for specified services was to prevent extortion by the sheriffs and to prevent the sheriffs from "eating up the substance of the people." Crofut v. Brandt, 58 N.Y. 106, 109 (1874); The New

York Court of Appeals in Crofut v. Brandt, supra, at pp. 111, 112 declared:

> 'What is a sheriff to do for his poundage? He is not to receive it for doing nothing.' . . .the policy of the law is that its executive officers should go among the people to lay hands upon their property with every needful restriction against the temptation to eat out their substance by the increase in magnitude or diversity of the charges and expenses of official service.

Also, Public Officers Law, Section 67, entitled "Fees of Public Officers", 46 McKinney's Consolidated Laws of New York, Annotated, Main Volume, 1952 edition, page 102.

This Court has held that in determining the validity of a statute on the issue of vagueness that

> The validity of its provisions must be tested on the basis of the terms employed. Champlin Rfg. Co. v. Commission, 286 U.S. 210, 242 (1931).

The language of this statute is such that men of common intelligence must necessarily guess at its meaning and thus it is unconstitutionally vague under the due process clause. Old Dearborn Distrib. Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936); Bandini

Petroleum v. Sup. Ct., 284 U.S. 8 (1931); Ashton v. Kentucky, 384 U.S. 195, 200 (1965).

NYCPLR 8012(b)(3) is unconstitutional also because, as construed by the highest court of the state, Thornhill v. Alabama, 310 U.S. 88, 96, 97, 99 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Beauharnais v. Illinois, 343 U.S. 250, 253 (1951), it is arbitrary, excessive, and confiscatory.

NYCPLR 8012 makes the sheriff a non-working, no risk partner of every party involved in an attachment proceeding where the sheriff merely serves an order of attachment on the attachment debtor or on a garnishee, to the amount of 5% of all money collected by the sheriff "by virtue of the order of attachment", whether by his own efforts or not, and to the amount of 5% "upon the value of the property levied upon," in the event that the order of attachment is vacated for any reason, or in the event that the action is settled, which in many cases and which in this case, amounts to a $50,000.00 "partnership" payment to the sheriff for performing the simple act of serving an order of attachment by delivering a copy thereof to two banks. (NYCPLR 8011(a)(1) sets the fee for the service by the sheriff of an order of attachment upon property at $20.00. The prior law set the fee at $10.00.) The amount of this fee has absolutely no relationship to the value or to the cost

of the service actually rendered by the sheriff in that attachment proceeding. Such an unconscionably exorbitant fee of $50,000.00 for the mere service of an order of attachment on two banks involves

> a palpable abuse of power and lack of reasonableness to accomplish a lawful end that they might be said to be merely arbitrary and capricious, and hence out of place in a government of laws and not of men . . . Chicago R. I. & P. R. Co. v. Perry, 259 U.S. 548, 553 (1921).

> A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be settled between the parties, the court system is usually 'the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of defendant called upon to defend his interests in court. Ante, at 376-377, 28 L.Ed.2d at 118. Boddie v. Connecticut, 401 U.S. 371, 387 (1971), Mr. Justice Brennan concurring in part.

NYCPLR 8012, as construed by the New York Court of Appeals, penalizes and makes a special charge against every party involved in an attachment proceeding as the price for coming into court

and employing the lawful remedy of attachment, which price is not assessed against other parties coming into court and employing lawful remedies. This special charge has absolutely no valid, or rational, reason, or compelling government interest for this arbitrary, grievous and invidious discrimination. Lindsey v. Normet, 405 U.S. 56, 78, 79 (1971); Life & Cas. Ins. Co. v. McCray, 291 U.S. 566 (1933). There is certainly no compelling state interest in NYCPLR 8012(b)(1), or 8012(b)(3). Kramer v. Union School District, 395 U.S. 621, 627 (1969).

New York CPLR 8012(b)(3) is not an exercise of the police power of the State of New York; it does not serve any interest of the public; it was not designed to promote the general well-being of the community, the public health, the public morals, the public safety, the public convenience, the general prosperity, or any other legitimate public purpose. C. B. & Q. Railway v. Drainage Comm'rs., 200 U.S. 561, 592, 593 (1905).

New York CPLR 8012(b)(3) especially penalizes every attachment plaintiff where the action is settled, or where the order of attachment is vacated.

> A statute (although in terms opening the doors of a court to a particular litigant) which places upon him as a penalty for his failure to make good his claim or defense a burden so

> great as to practically intimidate him from asserting that which he believes to be his rights is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. Cotting v. Goddard, 183 U.S. 79 (1899); Ex parte Young, 209 U.S. 123 (1907); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1885).

New York CPLR 8012 has a chilling effect upon the exercise of the fundamental right of every person to resort to the courts to resolve their problems, and just as equally, after having resorted to the courts, to settle their problems. The alternatives are either to pay the sheriff this outrageous and irrational "fee" for merely serving an order of attachment on a garnishee, or not being allowed to employ the attachment provisional remedy at all. See, Boddie v. Connecticut, 401 U.S. 371 (1971); Shapiro v. Thompson, 394 U.S. 618, 634 (1968); McDonald v. Board of Education, 394 U.S. 802, 807 (1968); Chambers v. Baltimore & Ohio R. Co., 207 U.S. 142, 148 (1907). The exorbitant price which a party must pay in order to be allowed to resort to the legal remedy of attachment under NYCPLR 8012 creates a discrimination based on wealth and effectively allows that remedy only to those with wealth and money who are able to pay the sheriff his "partnership" fee exaction. See, Douglas v. California, 372 U.S. 353 (1962); Griffin v.

Illinois, 351 U.S. 12; Roberts v. LaVallee, 389 U.S. 40 (1967); Williams v. City of Oklahoma City, 395 U.S. 458 (1969); Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961).

> Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether. Where money determines not merely 'the kind of trial a man gets,' Griffin v. Illinois, supra, (351 U.S. 12, 100 L.Ed. 91, 76 S. Ct. 585, 55 A.L.R.2d 1055 (1956) at 19, 100 L.Ed. at 899, but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee . . . . Boddie v. Connecticut, 401 U.S. 371, 388-389 (1971), Mr. Justice Brennan concurring in part.

The construction of NYCPLR 8012(b)(3) by the New York Court of Appeals whereby the sheriff becomes "entitled" to a fee of $50,000.00 in this case for the mere act of serving a copy of the order of attachment on two banks

> is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law and therefore in contravention of the 14th Amendment. See, Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111, 53 L.Ed. 417, 430, 29, Sup. Ct. Rep. 406. . . . Missouri P. R. Co. v. Tucker, 230 U.S. 340 (1912).

The holding of the New York Court of Appeals, to wit, that

> . . .it is not necessary for the sheriff to have reduced the property to his physical possession or to have actual custody in order to be entitled to poundage (Giminez v. Great Atlantic & Pacific Tea Co., 242 App. Div. 485; Esselstyn v. Union Sur. & Guar. Co., 82 App. Div. 474). All that is necessary is a properly effectuated levy (see CPLR 8012 subd [b], par. 3) which, in this case, was accomplished by service of a copy of the order of attachment upon two banks which were indebted to Downe Communications (See CPLR 6214 subd. [a])..,

effectively invalidates NYCPLR 6214(c), 6218, and 6220, which sets forth the duties which the sheriff is obliged to perform in the attachment process and leaves the sheriff with only the single, ordinary function of serving a copy of the order of attachment. Anyone could

do that for less than $10.00.

B. Dayon was denied the fundamental federal constitutional right to defend the action

Dayon raised the federal constitutional question of due process of law and equal protection of law by reason of the failure of the State courts to allow Dayon and Aetna to exercise their fundamental constitutional right to defend this action by DCI and the Sheriff upon the attachment bond by interposing the defense that Dayon was entitled to the order of attachment, that the order of the Appellate Division entered February 13, 1973 in the Dayon attachment action vacating the order of attachment was illegal, null and void, and that the Appellate Division had exceeded its jurisdiction and had assumed for itself a power and a jurisdiction which was not confided to it by or under any law of the State of New York to vacate the Dayon order of attachment on the ground that the first four causes of action of the Dayon complaint were "patently insufficient" as a pleading. (Supra, pp. 15-32). It is the settled law of the State of New York that a complaint is, and always has been, totally unnecessary to an application for an order of attachment and to any review of the validity of the order of attachment. Raimondi v. Fideli, 30 A.D.2d 802 (1st Dept. 1968); Fischer v. Langbein , 103 N.Y. 92 (1886); Zenith Bathing Pavilion v. Fair

Oaks, 240 N.Y. 310-313 (1925); 7A Weinstein-Korn-Miller, N.Y. Civ. Practice, Sections 6223.12, 6223.02. Such a decision was not a mere error of law; a determination whether a complaint, as a pleading, is sufficient or insufficient does not involve NYCPLR 6201, 6212(a) or 6223, nor the validity of an order of attachment nor any discretion to vacate it. The said Appellate Division could just as well have vacated the order of attachment because the day was Monday.

Since the action was entirely based on that order, Dayon and Aetna had a right to establish that it was void. The denial of that right to defend deprived Dayon and Aetna of the right to due process of law and equal protection of the law, in its fundamental sense of the right to be heard. Boddie v. Connecticut, 401 U.S. 371 (1971); Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1930).

This issue was raised in the court of first instance, in the affirmation of Charles Sutton, dated November 30, 1973 at paragraph 40.

The state court of first instance passed on this issue by its decision dated October 16, 1973 (Appendix, pp. A4-A6) and by its decision dated January 15, 1974 (Appendix, pp. A6-A8).

This issue was raised also in the New York Supreme Court, Appellate Division,

First Department, in the brief of Dayon at page 14, which stated that "Aetna has a right to contest every issue presented by the complaint including the validity of that Appellate Division order dated February 13, 1973"; the Appellate Division rendered no opinion.

This issue was raised also in the New York Court of Appeals in the brief of Dayon at page 65, Point II, entitled

> Aetna has a right to show that the Dayon order of attachment was valid, that Dayon was entitled thereto, that there is no judgment on the merits in the Dayon action, that the order of the Appellate Division in the Dayon action was invalid, contrary to law and deprived Dayon of due process of law and equal protection of law and otherwise to present a full defense.

The New York Court of Appeals passed on this issue by its decision (37 N.Y.2d 903, 905) (Appendix pp.A1-A4).

The first and only court to hold that the Appellate Divison order, dated and entered February 13, 1973 in the Dayon attachment action, constituted a holding that Dayon "was not entitled to the attachment of DCI's property" was the order of the New York Court of Appeals entered October 30, 1975 in this action (37 N.Y.2d 903, 905) (Appendix pp. A1-A4). In the Dayon attachment action,

the Appellate Division which vacated the Dayon order of attachment made no such finding (Appendix pp. A19-21). The court of first instance in this action in its two decisions, dated October 16, 1973 (Appendix pp. A4-A6) and January 15, 1974 (Appendix pp. A6-A8) made no such finding and did not so construe the said Appellate Division order. The Appellate Division itself, in this case, made no such finding, and did not render any opinion construing its own said order in the Dayon attachment action. The New York Court of Appeals thus directly passed upon this issue and thus on the federal question of the fundamental constitutional right of Dayon and Aetna to defendant against the action on the Dayon attachment bond brought by DCI and the sheriff by showing that the Appellate Division order was unconstitutionally void and deprived Dayon of his right to due process of law and equal protection of the law and that the condition of the Dayon bond had not been met.

C. Dayon raised the federal constitutional issue that there was no subject matter jurisdiction as to the Aetna interpleader complaint against Dayon and the Sheriff.

Dayon raised the federal constitutional issue that there was no subject matter jurisdiction as to the Aetna interpleader complaint against Dayon and the Sheriff for the first time on the motion

for Reargument to the New York Court of Appeals in his Reargument Brief at pp. 48-66. The decision of the New York Court of Appeals in this case at 37 N.Y. 2d 903, 905, modified the orders of the courts below which had denied the motion of Aetna for interpleader, and for the first time granted Aetna's motion for interpleader relief. This issue is timely raised. This Court has held that an issue as to the jurisdictional sufficiency of a complaint as a pleading could be raised for the first time on appeal to this Court. Slacum v. Pomery, 10 U.S. 221 (1810); Garland v. Davis, 45 U.S. 131 (1846).

The New York Court of Appeals rendered no opinion on this issue when it denied the Dayon motion for reargument by decision and order dated February 24, 1976.

The Dayon Reargument Brief shows the substantiality of the issue raised as well as its timeliness, at pp. 48-52, which included the following:

> Whether or not a court has jurisdiction of the subject matter of a dispute is determined by the constitution, statutes, and (occasionally) rules which confer jurisdiction. Because this ground of objection is an unwaivable one -- subject matter jurisdiction cannot be conferred by consent or stipulation or waiver or estoppel -- it is one of only three that will support a dismissal motion

at any time, even after the answering time has expired. McKinneys, CPLR 3211, Practice Commentary, C. 3211:11, p. 17; see also Meacham v. Jamestown, F. & C. R. Co., 211 N.Y. 346, 354 (1914); Solomon v. Kennedy, 38 N.Y. 2d 1090, 239 N.Y.S. 2d 814 (1963); McAffer v. Boston & M.R.R. Co., 268 N.Y. 400 (1935); Lewin v. Abrams, 253 A.D. 669, 3 N.Y.S. 2d 729, app. den. 254 A.D. 701, 6 N.Y.S. 2d 442, app. den. 278 N.Y. 702; Revona Realty Corp. v. Wasserman, 4 A. D. 2d 444, 166 N.Y.S. 2d 960, app. dnd. 5 N.Y. 2d 931, 183 N.Y.S. 2d 293 (1959); Lang v. Merchants Mutual Casualty Co., 203 Misc. 258, 116 N.Y.S. 2d 638, and cases cited; Ruggiero v. Faulkner, 31 A.D. 2d 639, 295 N.Y.S. 2d 960 (1968).

CPLR 3211(a)(2) contains the objection that the court lacks jurisdiction of the subject matter. This objection is of such pervasive significance that it can be raised at any time in any form and does not even require a motion. It can be raised by the court sua sponte. It would clearly be futile to impede in any manner the procedural path whereby to interpose this objection, whose seriousness will even void a final judgment after a vigorous trial on the merits. McKinney's CPLR, Practice Commentary, Section 3211(a)(2), p. 62; this objection

can be raised for the first time on appeal. Robinson v. Oceanic Steamship Nav. Co., 112 N.Y. 315, 324 (1889); Davidsburg v. Knickerbocker Life Ins. Co., 90 N.Y. 526 (1882). Risley v. Phenix Bank, 83 N.Y. 318, 337 (1880); Wheelock v. Lee, 74 N.Y. 495 (1878); Hoag v. Lamont, 60 N.Y. 96 (1875); Cutting Room Appliances Corp. v. Finkelstein, 33 A.D. 2d 674, 305 N.Y.S. 2d 348 (1st Dept. 1969); Morony v. Applegate, 266 A.D. 412, 42 N.Y.S. 2d 768 (1943); Consumer's Lumber Co. v. Lincoln, 225 A.D. 484, 233 N.Y.S. 530 (3rd Dept., 1929).

Subject matter jurisdiction of the Aetna 'interpleading complaint' against Dayon and the Sheriff is determinable under CPLR 1006. CPLR 1006(a) provides: 'A stakeholder is a person who is or may be exposed to multiple liability as a result of adverse claims. A claimant is a person who has made or may be expected to make such a claim. A stakeholder may commence an action of interpleader against two or more claimants.'

'Interpleader is a procedural device to protect a person from double or multiple liability when faced with two or more claims which are so related that recovery on one claim should exclude, in whole or in part, recovery on the other.' 6 Carmody-

Wait 2d, Section 40:1.

'A stakeholder, who is the only party to whom interpleader is available, is defined by the CPLR as a person who is or may be exposed to multiple liability as the result of adverse claims. A claimant, of which there must be at least two before interpleader relief is possible, is defined as a person who has made or may be expected to make such a claim. The language of the definitions is similar to Rule 22 of the Federal Rules of Civil Procedure, and since Rule 22 had been interpreted to mean that interpleader will be allowed wherever recovery by one claimant would exclude recovery by another, it was intended when the definitions were originally adopted that the same interpretations should be given to these definitions.' 6 Carmody-Wait 2d, Interpleader, Section 40:5, pp. 516, 517. Under this section the property ('stake') which is the subject of the action may be either real property, personal property or a mere chose in action. Subdivision (f) provides that this property may be deposited with the Court.' McKinney's CPLR 1006, Practice Commentary by David C. Kochery, p. 318.

In an action of interpleader, the interpleader plaintiff must allege positively that conflicting claims

to substantially the same thing, fund, debt, or duty are set up by the defendants. Williamsburg Savings Bank v. Bernstein, 277 N.Y. 11 (1911); (Pouch v. Prudential Ins. Co., 204 N.Y. 281, 284 (1912); Nelson v. Cross-Brown Co., 9 A.D. 2d 140, 192 N.Y.S. 2d 335 (1st Dept., 1959).

The subject matter of the Downe complaint against Aetna is a separate and distinct part of the $100,000.00 attachment bond number 71S 4466 signed by Aetna, which names Downe and which is limited to the amount only of up to $50,000.00. The subject matter of the Sheriff's 'counterclaim' against Aetna is the other, remaining, separate and distinct part of the $100,000.00 attachment bond number 71 S 4466 signed by Aetna which names the Sheriff and which is limited to the amount of only up to $50,000.00. Each $50,000.00 limit, as to Downe and as to the Sheriff on the attachment bond are exclusive of each other and neither Downe, nor the Sheriff lay claim against Aetna for the same money or for the same liability, or upon the same claim, and a recovery against Aetna on that attachment bond by either one would not exclude a recovery by the other in any way as to any amount. As to each $50,000.00 of the $100,000.00 attachment bond, Aetna has only one

separate and distinct exposure to liability: (a) Downe and (b) the Sheriff. No claim by either Downe or the Sheriff overlaps the other under the Aetna $100,000.00 attachment bond.

There is no subject matter jurisdiction as to the 'interpleader complaint' by Aetna against Dayon and against the sheriff, and that 'interpleader complaint' must be dismissed.

There is no subject matter jurisdiction for the 'counterclaim' by the sheriff against Aetna in 'response' to the unauthorized 'interpleader complaint' by Aetna against the sheriff, and that 'counterclaim' must be dismissed.

Dayon also raised the issue in his Reargument brief at pp. 66-68 for the first time that the counterclaim by the sheriff against Aetna and the crossclaim by the sheriff against Dayon must be dismissed for lack of subject matter jurisdiction and that such an objection could be raised at any time. Slacum v. Pomery, 10 U.S. 221 (1810); Garland v. Davis, 45 U.S. 131 (1846).

The New York Court of Appeals rendered no opinion on this issue when it denied the Dayon motion for reargument by decision and order dated February 24, 1976.

Respectfully submitted,

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APPENDIX

A. Memorandum opinion of New York Court of Appeals in this action dated October 30, 1975

STATE OF NEW YORK
COURT OF APPEALS
- -
1 No. 421
Downe Communications, Inc.,
Respondent
vs.
Aetna Casualty and Surety Company
Appellant
vs.
Al Dayon, individually &c.,
Interpleaded-Appellant
and
H. William Kehl, as Sheriff of the City of New York,
Interpleaded-Respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports

(421)

Bigham Englar Jones & Houston, N.Y. City, William P. Sullivan, Jr. of counsel) for appellant Aetna Casualty and Surety company.

Charles Sutton, N.Y. City, for appellant Al Dayon etc.

Javits & Javits, N.Y. City, (Harold J. Smith of counsel) for respondent

Downe Cmmctns.,Inc.
Paul L. Weinstein, N.Y. City, for respondent Sheriff of New York City.

MEMORANDUM:

The order of the Appellate Division should be modified to the extent of granting defendant (and interpleading plaintiff) Aetna's cross motion for summary judgment, directing that it be permitted to deposit the amount of its bond into court and, as so modified, affirmed with costs to prevailing parties; and the question certified should be answered in the negative.

Since Aetna "may be exposed to multiple liability as a result of adverse claims", it qualifies as a stakeholder (CPLR 1006, subd. [a]) and may seek to be discharged pursuant to the provisions of subdivision (f) of the CPLR provision. In such circumstance, "(a)bsent laches, a motion for discharge of the stakeholder should be granted, assuming no other valid objection is made" (2 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 1006.13, p.10-103). No claim of laches is made, nor is there any other valid objection to the relief sought by Aetna. Subject to the possible award of costs, by the express terms of the attachment bond forming Aetna's liability, such liability cannot exceed the amount it seeks to deposit in court and, hence, Aetna's cross motion for summary judgment should have been granted.

There is no triable issue of fact that would preclude summary judgment on the main appeal. In the prior action by interpleaded defendant-appellant Dayon against plaintiff Downe Communications, Inc., it was conclusively decided that Dayon was not entitled to the order of attachment (Dayon v. Downe Communications, 41 A D 2d 611, affd. 32 N Y 2d 937). Thus, plaintiff was properly awarded summary judgment on the issue of liability on the bond (see Subin v. United States Fid. & Guar. Co., 12 A D 49, 50).

Nor has a triable issue been raised respecting interpleaded defendant-respondent Sheriff Kehl's right to summary judgment. The claim is made that since Sheriff Kehl did not reduce the attached property to his possession that poundage is not due him. However, it is not necessary for the sheriff to have reduced the property to his physical possession or to have actual custody in order to be entitled to poundage (Giminez v. Great Atlantic & Pacific Tea Co., 242 App. Div. 485; Esselstyn v. Union Surety & Guaranty Co., 82 App. Div. 474). All that is necessary is a properly effectuated levy (see CPLR 8012, subd. [b][3]) which, in this case, was accomplished by service of a copy of the order of attachment upon two banks which were indebted to Downe Communications (see CPLR 6214, subd. [a]). Moreover, it has never been held, as Dayon asserts, that the amount of poundage is discretionary.

We have examined Dayon's other contentions and find them without merit.

* * * * * * * * *

Order modified, with costs to the prevailing parties against interpleaded defendant-appellant Dayon in accordance with the memorandum herein and, as so modified, affirmed. Question certified answered in the negative. All concur.

Decided October 30, 1975

B. No opinion was rendered by the New York Supreme Court, Appellate Division, First Department in this action.

C. Opinion of New York Supreme Court, New York County at Special Term Part I in this action dated October 16, 1973 granting motions for summary judgment by DCI and the sheriff

New York Supreme Court
County of New York
- -

Downe Commtions Inc.

-against-

The Aetna Casualty & Surety Co.
- -

INDIVIDUAL CALENDAR PART VIII

PRESENT:

HON. BERNARD NADEL,
Justice.

The following papers numbered 1 to ..... read on this motion..... this.....day of .....19.....

PAPERS NUMBERED

Notice of Motion and Affidavits Annexed.....Exhibits.....1-14
Order to Show Cause and Affidavits Annexed.....
Cross Motion, Exhibits.....15-22
Replying Affidavits.....23

Motions by plaintiff and interpleaded defendant, Sheriff of New York, are consolidated for disposition. The motions by both parties for summary judgment are granted as to liability. By the terms of the bond issued by the surety in accordance with the attachment order, the surety agreed to pay plaintiff damages of up to $50,000 "if the defendant [plaintiff here] recovers judgment or if it is finally determined that the plaintiff [interpleaded defendant Dayon here] is not entitled to the attachment of the defendant's [plaintiff here] property." The bond further states that the surety would pay up to $50,000 for allowable fees to the Sheriff of the City of New York.

The order of attachment was ultimately vacated by the Appellate Division, and three attempts by the interpleaded defendant Dayon for review by the Court of

Appeals have proved unsuccessful. Accordingly, the liability of the surety to the plaintiff and the sheriff has been established.

In light of the above, the surety's cross motion for an order permitting them to pay into court the amount in dispute in this action is denied as academic. Interpleaded defendant Dayon's cross motion for oral deposition of the plaintiff is granted. The deposition, however, shall be limited to the question of damages. The place and time of the deposition will be fixed in the order to be submitted herein.

Settle order providing also for an assessment of damages after completion of the deposition.

Dated 10/16/73

/s/ B. N.
.....
J.S.C.

County Clerk's No. 6568, 1973
Spec I Liber D58 Line 1, 1973

D. Opinion of New York Supreme Court, New York County at Special Term Part I in this action denying Dayon motion for renewal and reargument.

New York Supreme Court
County of New York
- -

Downe Communications

-against-

Aetna Casualty & Surety
- -

INDIVIDUAL CALENDAR PART 8

Cal # 92767

6568/73

PRESENT:

HON. Nadel
Justice

The following papers numbered 1 to ..... read on this motion..... this.....day of.....19.....

	PAPERS NUMBERED
Filed exhibits and affidavits annexed.....	1-12
Affidavit of Service annexed.....	13
Answering Affidavits and Exhibits.....	14-29
Plfs supplemental Affidavits and Exhibits.....	30-34

Interpleaded defendant Dayon's motion for renewal and reargument of a prior order of this court, dated November 5, 1973, is denied, there being no showing made that the court, in arriving at its decision, overlooked any operative fact or controlling principle of law.

Defendant and interpleading plaintiff Aetna's cross-motion for reconsideration of a prior order denying it permission to deposit monies into court having been rendered academic by the herein denial of defendant Dayon's motion, is also denied. The case is set down for assessment of damages on February 21, 1974, at 10:00 a.m.

.....

Dated 1-15-74 J.S.C.

Briefs: Plaintiff's.....
Interpleaded Defendant's X
Petitioner's.....
Respondent's.....
Relator's.....

County Clerk's No 6568, 1973
Spec I Liber D96 Line 2, 1973

FILED
JAN 17, 1974
NEW YORK CO. CLERK'S OFFICE

E. Opinion of New York Supreme Court, Bronx County, Special Term Part I, dated November 20, 1972 in the Dayon attachment action against DCI and others, denying two motions by DCI to vacate the Dayon order of attachment

SUPREME COURT : BRONX COUNTY

SPECIAL TERM : PART I

----------x

AL DAYON, individually and on behalf of MASTER-CRAFT ELECTRONICS CORP.,

Plaintiff

-against-

DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., THE CHEMICAL BANK, L.F. DOMMERICH CO., INC., JOSEPH O. BARLOW, IRWIN NATOV, ERIC M. JAVITS, REGAL ADVERTISING ASSOCIATES CORP., CAMPBELL-REYNOLDS, INC., ALEXANDER SALES CORP., JOHN DOE, RICHARD ROE and RICHARD ROE, INC., the last three names being fictitious, true names being presently unknown,

Defendants.

----------x

Index No. 15225/72

ROSENBERG, J.:

Defendants, Downe Communications Inc. and Edward R. Downe, Jr. have moved by two separate applications for an order vacating the ex parte order of attachment obtained by plaintiff on August 14, 1972 which permitted the attachment of property up to the amount of two million dollars belonging to either one or both of the two moving defendants.

Plaintiff has commenced this action against various defendants and has

pleaded six separate causes of action all of which demand money damages. Plaintiff alleges that the defendants acting individually and jointly, conspired to defraud and divest him of his stock in Master Craft Electronics Corporation, breached a contract with him and with Master Craft and thereafter wasted and plundered the assets of Master Craft forcing it out of business.

Plaintiff contends that on or about December 26, 1968, Master Craft entered into an agreement with Downe Communications whereby the latter agreed to provide a specified amount of advertising space for use of Master Craft in return for which Master Craft would deliver to Downe Communications, Campbell-Reynolds, Inc. and Regal Advertising Associates, Inc. a total of 1,333,333 shares of its stock. Thereafter, the defendants fraudulently conspired to force the individual plaintiff herein to convey the shares that he owned in Master Craft in return for a specified number of shares in Alexander Sales Corporation, a subsidy of Downes Communications, Inc. After acquiring the shares of Master Craft, plaintiff was ousted as Chairman of the Board and the obligation of Downe Communications to furnish advertising space to Master Craft pursuant to the agreement of December 26, 1968 was cancelled. Subsequently the assets of Master Craft were plundered and misappropriated by the defendant.

At the present time plaintiff has attached in excess of one million dollars in bank accounts belonging to Downe Communications, Inc. No attachment has been made on the assets of Edward R. Downe, Jr.

Defendants contend that the order of attachment is improper and unnecessary and that it has seriously disrupted their business affairs and will cause them serious financial damage.

Defendant's motions made pursuant to section 6223 CPLR are based on their allegations that the granting of the order of attachment, ex parte in the first instance was improper, that the alleged failure of plaintiff to comply with Rule 6212(d) CPLR requires a vacatur of the order and there is no need for an order of attachment in this case because of the financial solvency of defendant, Downe Communications Inc.

Section 6201 CPLR provides:

> "An order of attachment may be granted in any action ... where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants when
>
> 1. the defendant is a foreign corporation ...
>
> 5. the defendant, in an action upon

> a contract express or implied, has been guilty of a fraud in contracting or incurring the liability, or ...
>
> 8. there is a cause of action to recover damages ... for fraud or deceit."

It is conceded that Downe Communications Inc. is a foreign corporation, incorporated in the State of Delaware. Although it is licensed to do business in New York, it still is deemed to be a foreign corporation within the meaning of section 6201(1) CPLR, and subject to attachment (Marklin v. Drew, D.C. N.Y. 1967, 280 F. Supp. 176; Prentiss v. Greene, 193 App. Div. 672; Zeiberg v. Robosonics Inc., 43 Misc. 2d 134).

Section 6211 CPLR provides:

> "An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment ...."

Whether an order of attachment will issue in a particular case has traditionally been a question addressed to the discretion of the court and it is well established that upon a motion to vacate a warrant of attachment, the court may not consider the merits of the action and determine whether the plaintiff can succeed. Its function is to ascertain whether or not the plaintiff

has made out a prima facie case and complied with the requisite jurisdictional requirement. (American Reserve Ins. v. China Ins., 297 N.Y. 322; Auerbach v. Grand National Pictures, 176 Misc. 1031, aff'd. without opinion, 263 App. Div. 712; Weinstein-Korn-Miller, Sec. 6201.03).

The court must give the plaintiff the benefit of all of the legitimate inferences and deductions that can be drawn from the facts stated. The truth of all of the facts stated by plaintiff must be assumed in the absence of clear proof to the contrary. (U.S. v. Brown, 247 N.Y. 211; Zale Jewelry Co. v. Laine, 37 Misc. 2d 39; Public Admin. of N.Y. v. Gallo, 20 Misc. 2d 388, aff'd without opinion, 9 A D 2d 884).

As to defendant Edward R. Downe, Jr., it is apparent that the complaint is based upon the allegations of fraudulently inducing plaintiff to contract with certain defendants and making fraudulent representations which plaintiffs relied upon to their detriment, so as to entitle plaintiff to an order of attachment.

Defendant argues that an order of attachment is not necessary to protect the security of the plaintiff, on any judgment obtained and submits voluminous financial statements, affidavits and exhibits, purportedly showing the financial stability of the moving corporation.

Plaintiff submits the affidavit of a certified public accountant alleging that the defendant corporation's debts exceeds its assets, which raises serious questions as to the corporation's present financial condition.

Movants have the burden of proving that the attachment is not necessary for the security of the plaintiff. They failed to meet this burden of proof. (Freedman v. Wilson Securities Corp., 31 A D 2d 789; Fuller Company v. Vitro Corporation of America, 26 A D 2d 916).

Defendants' contention that the attachment must be vacated because plaintiff failed to serve copies of the supporting papers upon which the attachment was granted pursuant to demand, in accordance with CPLR 6212 D is without merit.

Plaintiff allegedly served the supporting papers upon defendants' attorneys by mail, on the day following the demand therefor and under all of the circumstances presented, vacatur of the attachment is unwarranted. (7A Weinstein-Korn-Miller, 6212.14).

Accordingly the motions are in all respects denied.

Settle order.

Dated: November 20, 1972

/s/ S. R. R.

J.S.C.

F. Memorandum Order and decision dated December 12, 1972 at New York Supreme Court, Bronx County, Special Term Part I in the Dayon attachment action against DCI, and others, denying the motion of DCI to renew motion to vacate the Dayon order of attachment.

Renew motion gdded 11/29/ # 18

NEW YORK SUPREME COURT--COUNTY OF BRONX

SPECIAL TERM, PART 1.

- -

Al Dayon, individ., etc.,

Downe Communications, Inc. et. al.,

- -

INDEX NUMBER 15225/72

Present:

HON. Samuel R. Rosenberg
Justice

The following papers numbered 1 to.... read on this motion submitted & referred this 29 day of November 1972
Calendar No. 18

PAPERS NUMBERED

Notice of Motion and Affidavits Annexed.....
Order to Show Cause and Affidavits

Annexed & exhibits.....1-5
Answering Affidavits.....6-7
Replying Affidavits.....
attachment order filed 8/15/72.....
.....8
Filed Papers (County Clerk's Office)
OSC filed 11/1/72.....9
Orders & attached papers fi.
11/22/72.....10,11

Upon the foregoing papers for renewal of a motion to vacate an order of attachment is denied. Section 1312 (a) of the Business Corporation Law, cited by the movants deals with the disability of a foreign corporation to sue in this State, but does not apply to the individual plaintiff here.

However, in view of the fact that plaintiff admits that funds, belonging to defendant in excess of $2,000,000 authorized by the order dated August 14, 1972 have been attached at various banks, the sum in excess of the authorized amount shall be released. Settle Order.

Dated December 12, 1972

/s/ S.R.R.
J.S.C.

G. Opinion of New York Supreme Court, Appellate Division, First Department dated February 13, 1973 in the Dayon attachment action against DCI, and others, vacating the Dayon order

of attachment dated August 14, 1972, officially reported at 41 A.D.2d 611 (New York).

APPELLATE DIVISION
FIRST DEPARTMENT

- -x

Al Dayon, Individually and on behalf of Master-Craft Electronics Corp.,

Plaintiff-Respondent,

-against-

Downe Communications, Inc., and Edward R. Downe, Jr.,

Defendants-Appellants,

-and-

The Chemical Bank, L.P. Dommerich Co., Inc., Joseph O. Barlow, Irwin Natov, Eric M. Javits, Regal Advertising Associates Corp., Campbell-Reynolds, Inc., Alexander Sales Corp., John Doe, Richard Roe and Richard Roe, Inc., the last three names being fictitious, true names being presently unknown,

Defendants.

- -x

Stevens, P.J., Nunez, Kupferman, Steuer, Tilzer, JJ.

6323
6323-A
6323-B

Al Dayon, individually and on behalf of Master-Craft Electronics Corp.,
Plaintiff-Respondent, C.Sutton

-against-

Downe Communications, Inc., et ano,
Defendants-Appellants,B.Botein

-and-

The Chemical Bank, et al.,
Defendants.

Two orders of the Supreme Court, Bronx County (Rosenberg, J.), each entered on November 30, 1972, denying motions to vacate warrant of attachment, and order of said court entered on December 27, 1972, which denied a motion to renew, unanimously reversed, on the law and the facts, and the motions granted. Appellants shall recover of respondent $60 costs and disbursements of these appeals.

As to the first four causes of action pleaded, the complaint is patently deficient. In addition, as to these and the remaining causes of action, plaintiff, when challenged by the motion to vacate, failed to come forward with any evidentiary facts to sustain his conclusory allegations. Furthermore, there is grave doubt as to whether an attachment is needed to secure plaintiff and

whether the material submitted was deceptive.

Order filed.

H. Order of Supreme Court Appellate Division, First Department, dated and entered February 13, 1973 in the Dayon attachment action against DCI, and others, vacating the Dayon order of attachment dated August 14, 1972, opinion officially reported at 41 A.D.2d 611 (New York).

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 13, 1973

Present--Hon. Harold A. Stevens, Presiding Justice, Emilio Nunez, Theodore R. Kupferman, Aron Steuer, George Tilzer, Justices.

----------x

Al Dayon, Individually and on behalf of Master-Craft Electronics Corp.,
Plaintiff-Respondent,

-against-

Downe Communications, Inc., and Edward R. Downe, Jr.,
Defendants-Appellants,

-and-

The Chemical Bank, L.P. Dommerich Co., Inc., Joseph O. Barlow, Irwin Natov, Eric M. Javits, Regal Advertising Associates Corp., Campbell-Reynolds, Inc., Alexander Sales Corp., John Doe, Richard Roe and Richard Roe, Inc., the last three names being fictitious, true names being presently unknown,

Defendants.

----------x

6323
6323-A
6323-B

Appeals having been taken to this Court by the above-named defendants-appellants from two orders of the Supreme Court, Bronx County (Rosenberg, J.), each entered on November 30, 1972, denying motions to vacate warrant of attachment, and from the order of said court entered on December 27, 1972, which denied a motion to renew,

And said appeals having been argued by Mr. Bernard Botein of counsel for appellants, and by Mr. Charles Sutton of counsel for respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the orders so appealed from be and the same hereby are reversed, on the law and the facts, and the motions granted. Appellants shall recover of respondent $60

costs and disbursements of these appeals.

ENTER:

HYMAN W. GAMSO

Clerk.

I. Order of New York Court of Appeals in this action dated and entered October 30, 1975

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 18th day of September in the year of our Lord one thousand nine hundred and seventy-five, before the Judges of said Court.

WITNESS,
The HON. CHARLES D. BREITEL,
Chief Judge, Presiding.

Joseph W. Bellacosa, Clerk

REMITTITUR October 30, 1975

x

1 No.
Downe Communications, Inc.,
Respondent
vs.

Aetna Casualty and Surety Company
Appellant
vs.
Al Dayon, individually &c.,
Interpleaded-Appellant

and
H. William Kehl, as Sheriff of the City of New York,
Interpleaded-Respondent.

BE IT REMEMBERED, That on the 11th day of December in the year of our Lord one thousand nine hundred and seventy four The Aetna Casualty and Surety Company and Al Dayon, individually &c., the appellants in this cause, came here unto the Court of Appeals, by Bigham, Englar, Jones & Houston Charles Sutton, their attorneys, and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Downe Communications, Inc., and H. William Kehl, as Sheriff of the City of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by Javits & Javits and Frederick Weinberger, their attorneys.

Which said return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by William P. Sullivan, Jr. for applt. Aetna Casualty, Mr. Charles Sutton of counsel

for the appellant Al Dayon, and by Paul Weinstein for respondent Sheriff and by Mr. Harold J. Smith of counsel for the plaintiff respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified, with costs to the prevailing parties against interpleaded defendant-appellant Dayon, in accordance with the memorandum herein and, as so modified, affirmed. Question certified answered in the negative.

All concur.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

WHEREFORE, it is considered that the said order is modified &c., AS AFORESAID.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in

the said Supreme Court, before the Justices thereof, &c.

DONALD M. SHERAW
Deputy Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,)
Albany, October 30, 1975)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

DONALD M. SHERAW
Deputy Clerk.

J. Decision slip (order) of New York Court of Appeals in this case dated and entered February 24, 1976 denying Dayon's motion to reargue the appeal.

1. Mo. No.

- -x

Downe Communications, Inc.

Respondent,

vs.

Aetna Casualty and Surety Company,

Appellant,

Dayon, individually, etc.,

Interpleaded Appellant,

and

H. William Kehl, as Sheriff of the City of New York,

Interpleaded-Respondent.

- -x

Decision Court of Appeals
February 24, 1976

Motion for Reargument Denied.

K. Notice of Appeal by Dayon filed in the Office of the Clerk of the County of New York and of the Supreme Court of the State of New York, County of New York, on March 19, 1976.

COURT OF APPEALS : STATE OF NEW YORK

- -x

DOWNE COMMUNICATIONS, INC.,

Plaintiff-Respondent,

- against -

THE AETNA CASUALTY AND SURETY COMPANY,

Defendand and Interpleading

Plaintiff-Appellant,

- against-

AL DAYON, individually, and on behalf of MASTER-CRAFT ELECTRONICS CORP.,

Interpleaded Defendant-Appellant,

and

H. WILLIAM KEHL, as Sheriff of the City of New York,

Interpleaded Defendant-Respondent.

- -x

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES:

I. Notice is hereby given that Al Dayon, individually and on behalf of Mastercraft Electronics Corp., the appellant above named, hereby appeals to the Supreme Court of the United States from a final order of the Court of Appeals of the State of New York dated and entered October 30, 1975 which modified and affirmed the Orders of the Supreme Court of the State of New York, County of New York dated November 5, 1973 and entered November 8, 1973 and January 15, 1974 and each and every part thereof, and from the order of the Court of Appeals of the State of New York dated

February 24, 1976 denying the appellant's motion for reargument.

II. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

III. The Clerk will please prepare a transcript of the record of this cause, for transmission to the Clerk of the Supreme Court of the United States, and to include in said transcript the following:

1. Notice of Appeal of Interpleaded defendant Dayon, etc.

2. Notice of Appeal of Defendant Aetna Casualty and Surety Co.

3. Decision of lower court dated October 16, 1973 on motion of respondent Downe Communications, Inc. for summary judgment against appellant Aetna Casualty and Surety Co.

4. Decision of lower court dated October 16, 1973 on cross-motion of respondent Sheriff for summary judgment against appellant Aetna Casualty and Surety Co.

5. Order on appeal dated November 5, 1973 granting respondents' motion and cross-motion for summary judgment against appellant Aetna Casualty and Surety Co., etc.

6. Notice of Motion by respondent

Downe Communications, Inc. for summary judgment.

7. Affidavit of Francis A. Loughlin, sworn to July 5, 1973:

A. Exhibits to said affidavit of Loughlin:

(1) Complaint

(2) Answer of Aetna to Complaint

(3) Interpleading Complaint of Aetna

(4) Answer of Dayon to Complaint

(5) Answer of Dayon to Aetna Interpleading complaint

(6) Answer of Sheriff to Aetna Interpleading complaint

(7) Reply of Downe Communications, Inc. to Aetna Counterclaim

(8) Order of attachment dated August 14, 1972 in the action by Dayon, etc., plaintiff, v. Downe Communications, Inc., et al.

(9) Undertaking on the above attachment issued by The Aetna Casualty and Surety Co., dated September 22, 1972

(10) Copy of purported letter dated December 4, 1972

(11) Copy of letter from the Bank of New York dated December 5, 1972

(12) Decision dated February 13, 1973 of this Appellate Division on the appeals by Downe from three orders denying motions to vacate above order of attachment dated August 14, 1972

(13) Order dated February 13, 1973 by this court on above decision

(14) Order dated February 21, 1973 by this Court denying Dayon motion for leave to appeal to Court of Appeals

(15) Notice by Sheriff releasing attachment, if any, First National City Bank

(16) Notice by Sheriff, releasing attachment, if any, Bank of New York

(17) Notice by Sheriff releasing attachment, if any, Bankers Trust Co.

(18) Judgment dated March 13, 1973 dismissing the complaint

(19) Decision of Justice Massi as to above judgment

(20) Decision of Court of

Appeals dated June 8, 1973 that order of Appellate Division dated February 13, 1973 is not one which necessarily affects final judgment and dismissing direct appeal from judgment

8. Notice of Cross-Motion by Aetna to deposit money.

9. Affidavit of William P. Sullivan, Jr. sworn to July 13, 1973.

10. Notice of motion by Sheriff for summary judgment against Aetna.

11. Affidavit of Joseph P. Brennan, Jr., sworn to July 12, 1973.

12. Affirmation of Charles Sutton dated July 24, 1974 in opposition to all motions.

TABLE OF CONTENTS on motion by Dayon to Renew and Reargue

13. Notice of Appeal of Interpleaded defendant Dayon.

14. Decision of lower court dated January 15, 1974 denying motion to renew and reargue.

15. Order to Show Cause dated December 14, 1973 on motion by Dayon to renew and reargue.

16. Affirmation of Charles Sutton dated November 30, 1973.

17. Affirmation of Charles Sutton dated December 12, 1973.

A. Exhibits:

(1) Order of attachment dated August 14, 1972

(2) Affidavit of Al Dayon, sworn to August 11, 1972 in support of order of attachment

(3) Verified complaint dated August 11, 1972 in support of order of attachment

(a) Exhibits to said Complaint:

(i) Contract dated December 26, 1968

(ii) Letter by Downe Communications, Inc. dated June 4, 1970 breaching contract dated December 26, 1968

(iii) Letter agreement re stock of Dayon in Mastercraft Electronics Corp. with Downe Communications, Inc. dated February 19, 1970

(iv) Stock power by Dayon to Downe Communications, Inc. dated February 19, 1970

(v) Irrevocable Proxy by Dayon to Downe Communications,

Inc. dated February 19, 1970

(vi) Verification of complaint on August 11, 1972

18. Affidavit of George R. Hinckley in opposition dated December 18, 1973.

A. Exhibits:

(1) Letter dated October 24, 1973 to Supreme Court of the State of New York at County of New York from Sheriff

(2) Letter dated October 26, 1973, ibid

19. Affidavit of Frederick Weinberger in opposition.

20. Affidavit of Elliot Padernacht.

IV. The following questions are presented b y this appeal:

1. Is New York Civil Practice Law and Rules Section 8012 unconstitutional on its face and as applied by the New York Court of Appeals?

2. Is New York Civil Practice Law and Rules Section 6214 unconstitutional on its face and as applied by the New York Court of Appeals?

3. Does the order on appeal deprive the appellant of due process of

law and equal protection of the law?

4. Is a party deprived of its constitutional right to due process of law and equal protection of the law when the Court does not allow the surety the right to litigate the very issue upon which its liability depends under an attachment bond issued by it in a separate action on the bond by the former attachment defendant and does not consider or review the jurisdictional invalidity of the order which vacated the order of attachment in the attachment action to which the surety was not a party, and does not consider or review the jurisdictional invalidity of the order which vacated the order of attachment in the attachment action to which the surety was not a party, but upon which the former attachment defendant relied as the basis for liability of the surety in its action against the surety?

5. Under New York statutes where a former attachment defendant has brought an action for damages against the attachment bond surety on the attachment bond, is there subject matter jurisdiction for an "interpleader" complaint by the attachment bond surety against the former attachment plaintiff who makes no claim against the surety under the attachment bond, or against the Sheriff of the City of New York whose claim for poundage fees is covered by a distinctly separate amount and separate provision of the attachment bond

from that which covers and relates to the former attachment defendant, and no part or either amount or coverage of the attachment bond overlaps the other, so that the surety does not face any conflicting claim by either the former attachment defendant or the Sheriff of the City of New York under the attachment bond, and does the allowance of interpleader and the grant of summary judgment for interpleader in favor of the surety by the highest court of the State of New York violate appellant's constitutional rights?

6. Is the appellant deprived of due process of law and equal protection of the laws by the order on appeal which grants summary judgment to the plaintiff upon a complaint that is insufficient on its face and upon a cause of action not pleaded?

/s/ CHARLES SUTTON
Charles Sutton
Attorney of Record for Al Dayon, individually and on behalf of Mastercraft Electronics Corp. appellant
299 Broadway
New York, New York 10007
212 - 964 - 8612

Dated: March 18, 1976

Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER 1975 TERM

Docket No. 75-1750

AL DAYON, Individually and on Behalf of Mastercraft Electronics Corp.,

Appellant,

-against-

DOWNE COMMUNICATIONS, INC., THE AETNA CASUALTY AND SURETY COMPANY AND H. WILLIAM KEHL, as Sheriff of the City of New York,

Appellees.

On Appeal From the Court of Appeals for the State of New York

MOTION TO DISMISS APPEAL

JAVITS & JAVITS
Attorneys for Appellee,
Downe Communications, Inc.
1345 Avenue of the Americas
New York, New York 10019
(212) 586-4050

By: George R. Hinckley

Printinghouse Press (Appeals Section) 212-687-0384

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION PURSUANT TO RULE 16

DOWNE COMMUNICATIONS, INC. ("DCI") plaintiff-appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss this appeal on the ground that Appellant has no right of Appeal to this Court under 28 U.S.C. §1257(2) and on the ground that the appeal does not present a substantial federal question, indeed it presents no federal question at all with respect to DCI, and on the further ground that the alleged federal question was neither raised in or passed on by the New York Court of Appeals. In addition, the judgment appealed from rests upon an adequate non-federal basis.

NO FEDERAL QUESTION IS PRESENTED WITH RESPECT TO APPELLEE, DCI

The appellant in his jurisdictional

statement questions the validity of two New York statutes. These statutes deal with poundage and levying and relate solely to the Sheriff; they have no application to DCI.

The only questions raised by appellant with respect to DCI concern the affirmance by the New York Court of Appeals of the grant of summary judgment. Appellant alleges that this action resulted in a denial of due process and of equal protection. This position is untenable.

The award of summary judgment to DCI was not based on the statutes whose validity has been drawn into question, rather the judgment in favor of DCI on the attachment bond was made because no triable issue of fact existed as to appellant's liability.

The question of whether summary judgment has been properly granted is

purely a question of state law which this Court has held it has no jurisdiction to review. In United States v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942), this Court declined to review a decision of the New York Court of Appeals affirming summary judgment and stated (at U.S. 216):

> "We agree with those contentions. It is in accord not only with the motion papers but also with the Ruling of the New York Court of Appeals that the Moscow case 'left open no question which has been argued upon this appeal.' In view of that ruling, we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow case. That is distinctly a question of state law on which New York has the last word."

Appellant has attempted to give this state law issue Constitutional dimensions by raising due process and equal protection claims. This Court has dealt with such claims before and stated in

Enterprise Irrigation District v. Farmer's Mutual Canal Company, 243 U.S. 157, 37 S.Ct. 318 (1917) (at U.S. 166):

> "The claim that the court, in disposing of some of the questions including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. (Citations omitted) The questions presented other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law of the state, and the state court's decision of them is controlling." (citations omitted)

This Court addressed itself to the same issue in McDonald v. Oregon R. S. Nav. Co., 233 U.S. 665, 34 S.Ct. 772 (1913), and in dismissing for want of jurisdiction stated (at U.S. 669-70):

> "It is elementary and needs no citation of authority to show that the due process clause of the fourteenth amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-federal in character."

Appellant's argument though couched in Constitutional terms seeks nothing more than a review of the application of local law by a state court. The United States Supreme Court has no jurisdiction to entertain such a request.

APPELLANT HAS NO RIGHT TO APPEAL PURSUANT TO 28 U.S.C. 1257(2)

Appellant's attempt to appeal to this Court as of right pursuant to 28 U.S.C. 1257(2) is equally without merit.

The New York Court of Appeals decision does not explicitly or implicitly pass upon or consider the constitutional

validity of the statutes drawn into question. The issue of validity was neither timely nor properly raised nor even seriously argued by appellant. The decision as regards DCI rests upon ordinary principles of contract law which is an adequate non-federal basis and does not concern itself with any federal questions, substantial or otherwise.

In Raley v. State of Ohio, 360 U.S. 423, 79 S.Ct. 1257 (1959), this court stated (at U.S. 434-35):

> "We must examine our jurisdiction over these appeals. Appellants assert jurisdiction under 28 U.S.C. §1257(2), 28 U.S.C.A. §1257(2), a grant of jurisdiction on appeals, 'where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.' In their notices of appeal to this Court, appellants have phrased some of their federal constitutional claims as attacks on the constitutionality of the Ohio statute authorizing the Commis-

> sion and the statute providing for immunity. But this does not suffice:
>
> 'It is essential to our jurisdiction on appeal * * * that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws.' Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U.S. 182, 185, 65 S.Ct. 624, 627, 89 L.Ed. 857."

It is submitted that appellant has failed to properly invoke the jurisdiction of this Court and that therefore this Court has no jurisdiction of this appeal.

WHEREFORE, it is respectfully requested that this unwarranted appeal should be dismissed for lack of jurisdic-

tional requirements with all costs being assessed against Appellant.

Respectfully submitted,

JAVITS & JAVITS
Attorneys for Appellee
Downe Communications, Inc.
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Supreme Court of the United States

October 1975 Term

Docket No. 75-1750

AL DAYON, individually and on Behalf of Mastercraft Electronics Corp.,

Appellant,

—against—

DOWNE COMMUNICATIONS, INC., THE AETNA CASUALTY AND SURETY COMPANY AND H. WILLIAM KEHL, as Sheriff of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS FOR THE STATE OF NEW YORK

ANSWER TO MOTION TO DISMISS APPEAL
PETITION OF APPELLANT FOR LEAVE TO AMEND JURISDICTIONAL STATEMENT
PETITION FOR WRIT OF CERTIORARI

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To: The Honorable Justices of the
Supreme Court of the United States:

The petition of Al Dayon, individually and on behalf of Mastercraft Electronics Corp. for leave to amend the jurisdictional statement nunc pro tunc, and to consider the jurisdictional statement, as necessary, nunc pro tunc, as a petition for a writ of certiorari to the New York Court of Appeals, and the answer to the motion of Downe Communications, Inc. to dismiss the appeal as to it, by Bernard G. Ehrlich, his attorney, respectfully shows:

Point I

The appeal is properly before this Court and this Court has jurisdiction of every other denial of federal right.

The appellee Downe Communications, Inc., hereinafter DCI, concedes at pp. 1, 2 of its motion to dismiss that

> The appellant in his jurisdictional statement questions the validity of two New York Statutes...

and that their

> validity has been drawn into question.

Plainly, the appeal to this Court

is proper and this Court has jurisdiction of every other denial of federal right. (Jurisdictional Statement, pp. 5-6, 6-13, 39-43).

The Jurisdictional Statement at pp. 3, 4 states:

> The jurisdiction of this Court is involved pursuant to 28 U.S.C. Section 1257(2) because this is an appeal from a final order of the highest court of the State of New York... which denied interpleaded defendant Dayon and defendant and interpleading plaintiff Aetna Casualty and Surety Co. due process of law and equal protection of law by granting summary judgment to plaintiff Downe Communications, Inc. upon a cause of action not pleaded and not proved and which denied said Dayon and said Aetna Casualty and Surety Co. due process of law and equal protection of law by denying each of them the right to defend the action upon the attachment bond by the plaintiff, Downe Communications, Inc.

Moore's Federal Practice, Judicial Code, p. 371 (Rel. No. 31-1976), Ch. 81, Supreme Court, Section 1257, states:

> Where an appeal is proper, the appellant can include in his assignments of error any other denial of federal right whether or not capable in itself of being brought here by appeal. Prudential Insurance Co. v. Cheek, 259 U.S. 530, 547, 42 S. Ct. 516, 523, 66 L. Ed. 1044, 27 ALR 27. Or he...(can file) a petition for certiorari in addition to his appeal. Columbus & Greenville Ry. Co. v. Miller, 283 U.S. 96, 98, 51 S. Ct. 392, 393, 75 L. Ed. 861. Fluornoy v. Weiner, (1944) 321 U.S. 253, 263, 64 S. Ct. 548, 88 L. Ed. 708.

This Court, in Prudential Ins. Co. v. Cheek, 259 U.S. 530, 547 (1921) held:

> It is assigned for error, aside from the Statute, that the decision of the Missouri court sustaining the cause of action under the second count amounts to depriving plaintiff in error of property without due process of law. This point was set up properly in the State courts as a special claim of immunity under the Fourteenth Amendment; and although under Section 237, Judicial Code, as amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, it could not have been made the basis of a writ of error from this court, but only a writ of certiorari, we think that, by the fair intendment of the Act, since the record has been brought here properly under the writ of error because involving the constitutionality of a statute, plaintiff in error is at liberty to assign any other ground of error therein, based upon an adverse decision by the State court of last resort upon any right,

title, privilege or immunity specially set up or claimed under the Constitution or laws of the United States.

The Jurisdictional Statement on behalf of appellant Dayon shows at pp. 53-54 that Dayon and Aetna were denied the fundamental federal constitutional right to be heard, to have their day in court and to defend the action upon the statutory attachment bond by DCI against Aetna; it shows at pp. 54-56 that these issues were raised in the State courts and were passed upon by the State courts. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 547 (1921); Missouri, Kansas etc. Ry. Co. v. Elliott, 184 U.S. 530, 534 (1902).

Point II

This Court has jurisdiction of the appeal from the summary judgment in favor of Downe Communications, Inc. on grounds properly raised below and presented to this Court in the Jurisdictional Statement.

This Court in Broad River Co. v. South Carolina, 281 U.S. 537, 540 (1929) stated: "Where the state court has denied to rights asserted under local law, the protection which the Constitution guarantees is the question upon which the petitioners are entitled to invoke the judgment of this Court."

The state courts denied Dayon and Aetna their federal constitutional rights under the due process and equal protection clauses by granting DCI summary judgment

upon a cause of action which was not pleaded, Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1914); Reynolds v. Stockton, 140 U.S. 254, 265, 268, 269, (1891) and which was not proved and which had no basis in fact whatever. Time, Inc. v. Firestone, ___ U.S. ___, 96 S. Ct. 958 (1976); Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 473; See, Thompson v. Louisville, 362 U.S. 199 (1960); Cole v. Arkansas, 333 U.S. 196, 291 (1947); Vachon v. Louisiana, 414 U.S. 478 (1973).

The Jurisdictional Statement at pp. 3, 4 showed that this issue was before the Court and that it was within the jurisdiction of this Court.

The Jurisdictional Statement at pp. 13, 14 includes this issue in Questions 3, 4, and 6 of the Questions Presented by the Appeal.

The Jurisdictional Statement at pp. 33 shows that the cause of action pleaded by DCI alleged only that in the prior Dayon attachment action against DCI in which that statutory attachment bond was filed, that the Appellate Division, by a non-final order dated February 13, 1973, merely vacated the order of attachment. It did not decide that Dayon was not entitled to the attachment of DCI's property. Jurisdictional Statement pp. A17-A19.

The Jurisdictional Statement shows at pp. 22-24 that the condition for liab-

ility under the statutory attachment bond is the finding that it was "finally decided that the plaintiff was not entitled to an attachment of the defendant's DCI's property," and that the mere vacatur of the order of attachment does not create any liability under that statutory attachment bond. 7A Weinstein-Korn-Miller, N.Y. Civ. Prac., Section 6212.08. (See, also, Jurisdictional Statement pp. 33-34)

The Jurisdictional Statement at pp. 53-56 shows that the New York Courts passed on this issue.

The Jurisdictional Statement at pp. A17-A19 shows that in the Dayon attachment action, in reversing the lower court and vacating the Dayon order of attachment, the Appellate Division made no finding of fact that Dayon was not entitled to the order of attachment. The lower court in that action had found, on the other hand, that Dayon was entitled to the order of attachment. Jurisdictional Statement, pp. A9-A14, NYCPLR 5712 (c)(2) requires the Appellate Division, on reversing a lower court, to

> specify the findings of fact which are reversed or modified and set forth any new findings of fact made by the Appellate Division with such particularity as was employed for the statement of the findings of fact in the court of original instance. NYCPLR 5712(c)(2).

Since the plain findings of fact of the lower court in the Dayon attachment action was that Dayon was entitled to the order of attachment. (Jurisdictional Statement pp. A9-A14), and since those findings of fact were not overruled and were not substituted by contrary findings of fact by the Appellate Division when it vacated the Dayon order of attachment, then it must be deemed that the Appellate Division vacated the order of attachment on grounds other than that Dayon was not entitled to the attachment of DCI's property. See, 7A Weinstein-Korn-Miller, N.Y. Civ. Prac., Section 6212.08, which shows that an order of attachment under present practice can be vacated on "technical grounds" with the result that no liability accrues under the statutory attachment bond.

Yet, upon the fact of the bare vacatur of the order of attachment by the Appellate Division in the action of Dayon against DCI, DCI moved for summary judgment upon the complaint which alleged only that the Appellate Division had "vacated" the Dayon order of attachment; that motion for summary judgment was granted. The lower court, New York Supreme Court, Special Term Part I, in its decision in this action stated:

> ...The order of attachment was ultimately vacated by the Appellate Division.... Accordingly, the liability of the Surety to the plaintiff and the Sheriff has been established.

(Underscoring added) (Jurisdictional Statement, pp. A5-A6)

The sole basis for granting DCI summary judgment was the bare fact that the Appellate Division had vacated the Dayon order of attachment. The statutory attachment bond and NYCPLR 6212(b), (Jurisdictional Statement pp. 22-24) however, condition liability not on mere vacatur of an order of attachment, but upon a final decision that "plaintiff was not entitled to an attachment of plaintiff's property." This condition was not alleged in the complaint, and it was not proved on the motion for summary judgment. The court did not find that this condition of the statutory attachment bond had been met.

In this action, the state court of first instance did not make any finding, as it could not, that the Appellate Division in the Dayon attachment action had "finally decided that Dayon was not entitled to an attachment of the property of Downe Communications, Inc."; (Jurisdictional Statement, pp. A5-A6); neither did the Appellate Division on the appeal in this action (Jurisdictional Statement, pp. A-4). However, the New York Court of Appeals, in its opinion at 37 N.Y. 2d 903 (1975) (Jurisdictional Statement, pp. A1-A4) stated that:

> In the prior action by interpleaded defendant-appellant Dayon against plaintiff Downe Communications, Inc.,

> it was conclusively decided that Dayon was not entitled to the order of attachment (Dayon v. Downe Communications, 41 A.D. 2d 611, aff'd. 32 NY 2d 937). Thus, plaintiff was properly awarded summary judgment on the issue of liability on the bond. (See, Subin v. United States Fid. & Guar. Co., 12 A.D. 2d. 49, 50).

The Subin case, cited by the New York Court of Appeals, was decided under the predecessor statute to the present NYCPLR 6212(b); under the predecessor statute, liability upon the attachment bond accrued upon mere vacatur, in those words, of the order of attachment. 7A Weinstein-Korn-Miller, N.Y. Civ. Prac. Section 6212.08; N.Y.C.P.A. Section 907; 7B McKinney's Consolidated Laws of New York Annotated, Legislative Studies and Reports, pp. 59-60. The present statute, NYCPLR 6212(b) conditions liability on the attachment bond on a very different basis, namely upon a final decision by the attachment court that the 'plaintiff was not entitled to an attachment of defendant's property'.

The reliance by the New York Court of Appeals on the Subin case, 12 A.D. 2d 49, 50, shows that the said court was clearly adopting and applying a plainly wrong principle of law, Chicago, B. & O. Ry. Co. v. Babcock, 204 U.S. 585, 598 (1906) and shows that it was arbitrary and denied Dayon and Aetna the equal protection of law.

The New York Court of Appeals citation of "Dayon v. Downe Communications (41 A.D. 2d 611, aff'd. 32 N.Y. 2d 937)" is factually wrong because the Appellate Division order vacating the attachment was never appealed to or reviewed by the New York Court of Appeals. The application by Dayon to the Appellate Division for leave to appeal to the New York Court of Appeals was denied. Since that Appellate Division order was not a final order, it was not appealable as of right to the New York Court of Appeals. NYCPLR 5601. The citation, "32 N.Y. 2d 937" involved another appeal.

The jurisdiction of the New York Court of Appeals under the settled law of that state is confined to ruling on issues of law only. N.Y. Const. Article VI, Section 3; Ballen v. Potter, 251 N.Y. 224 (1929); NYCPLR Section 5501(b). The New York Court of Appeals has no power and no jurisdiction under the settled construction of the New York State Constitution, Article VI, Sec. 3, and the NYCPLR Section 5501(b) to make original findings of fact. Bigelow v. Forrest, 76 U.S. 339, 350, 351 (1869); Ex-parte Wilson, 114 U.S. 417, 421 (1885); Windsor v. McVeigh, 93 U.S. 274,282, 283 (1876).

There is absolutely no basis in fact in the Dayon attachment action for the above-quoted statement of the New York Court of Appeals in this action that "it was conclusively decided that Dayon was

not entitled to the order of attachment"; (Jurisdictional Statement, pp. A1-A4) and no court had made such a finding in the Dayon attachment order. Time, Inc. v. Firestone, ___ U.S. ___, 96 S. Ct. 958, 969, 970 (1976); Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 473, 474 (1918).

The New York courts gave summary judgment to DCI upon a cause of action which it had not pleaded and which it had not proved, and thereby denied Dayon and Aetna their constitutional right to due process of law and equal protection of the law. Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1914); Reynolds v. Stockton, 140 U.S. 254, 268, 269 (1891).

The New York Court of Appeals violated Dayon's and Aetna's constitutional right to due process of law and equal protection of law by giving to the nonfinal order of the Appellate Division dated February 13, 1973 in the Dayon attachment action against DCI (Jurisdictional Statement pp. A17-19), which involved different parties and different issues, and in which no court made any finding of fact that 'Dayon was not entitled to an attachment of DCI's property, (Jurisdictional Statement pp. 22-24, A17-A19), a construction that had no basis in fact, as noted above, and also by holding that such construction of the Appellate Division order in the attachment action, Jurisdictional Statement,

pp. A17-A19, was conclusive against Aetna Casualty and Surety Co. in this action (Jurisdictional Statement pp. A1-A4), even though Aetna was not a party to the Dayon attachment action against DCI, Hansberry v. Lee, 311 U.S. 32, 37, 40 (1940); United States v. Moser, 266 U.S. 236, 242 (1924), and even though this action involves a different cause of action, between different parties upon different facts than the attachment action. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 578-579 (1973).

Under New York Law the non-final order in the Dayon attachment action has no conclusive effect in a subsequent action against the surety on the attachment bond and it is not conclusive against the surety even if it had been on the same point, and even if there had been a specific finding of fact on that point. Liberty Mutual Ins. Co. v. George Colon & Co., 260 N.Y. 299 (1932); Sears, Roebuck & Co. v. 9th Avenue and 31st Street Corp., 274 N.Y. 388 (1937); Bannon v. Bannon, 270 N.Y. 484 (1936); Bridgeport Ins. Co. v. Wilson, 34 N.Y. 275 (1866); Hershkowitz v. Travelers Ins. Co., 272 A.D. 584 (1st Dept. 1947).

Aetna is entitled to its day in court and to present a full defense against the complaint of DCI against Aetna. Blonder-Tongue v. University Foundation, 402 U.S. 313, 329 (1970).

It is respectfully submitted that

the challenge to the constitutionality to NYCPLR 8012(b)(3) by Dayon necessarily implicated and thereby challenged the constitutionality of NYCPLR 6212(b) and that the judgment of the court could not have been rendered without deciding that issue. The jurisdiction of this Court is properly involved in this issue. Green Bay & Canal Co. v. Patten Paper Co., 172 U.S. 58, 68 (1898); also, Jurisdictional Statement pp. 42, 43; Powell v. Brunswick Surety, 150 U.S. 433, 440 (1893).

The Jurisdictional Statement at pp. 32-33 shows that the complaint in this action by Downe Communications, Inc. against Aetna Casualty & Surety Co. alleged it to be an action upon a statutory attachment bond which had been filed in court in the state attachment action wherein Al Dayon, individually and on behalf of Downe Communications, Inc., was the plaintiff against Downe Communications, Inc. and others, as defendants. The Jurisdictional Statement shows at pp. 22-24 that the said Dayon attachment bond was made pursuant to the New York Civil Practice Law and Rules Section 6212(b). The text of NYCPLR 6212(b), which was not set out in the Jurisdictional Statement, and for which amendment nunc pro tunc is sought to do so, is as follows:

> Undertaking. On a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than two hundred fifty dollars, a specified part

thereof conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the Sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the Sheriff for his fees.

It is respectfully submitted that NYCPLR 6212(b) on its face and as applied is unconstitutional and deprives petitioner of his federal constitutional rights. It is vague and overbroad, and fails to set forth any standard for the court to apply the terms thereof including the setting of the amount of the bond. The statutory requirement for an attachment bond is not tailored to meet any state or valid public welfare purpose. See, Lindsey v. Normet, 405 U.S. 56 (1972); (See, also, Jurisdictional Statement and citations, pp. 46-53). NYCPLR 6212(b)requires that a plaintiff file a statutory bond in an amount to be set by the court as a condition precedent to being allowed to make use of and to employ the statutory procedure of attachment; it thereby unconstitutionally conditions and limits the right of a plaintiff to resort to the court to resolve his problem to resort to and employ the universal and long-established pro-

cedure of attachment, and discriminates between plaintiffs on the basis of wealth, allowing only those plaintiffs with enough money to satisfy the arbitrary demands of the court to employ that procedure. Jurisdictional Statement and citations, pp. 46-53; Smith v. Bennett, 305 U.S. 708 (1961). There is no standard in the statute by which a court is guided in setting the amount of the bond and any court can arbitrarily fix a bond in an amount so high as to preclude the use of that statutory attachment remedy against any particular defendant. Jurisdictional Statement and Citations, pp. 46-53.

Point III

The motion to dismiss by DCI is not well founded.

The appellee, Downe Communications, Inc., hereinafter DCI, moved to dismiss the appeal on the grounds stated in its motion at page 1 that

> No federal question is presented with respect to appellee, DCI,

and at page 2 that

> The award of summary judgment to DCI was not based on the statutes whose validity has been drawn into question, rather the judgment in favor of DCI on the attachment bond was

made because no triable issue of fact existed as to appellant's liability.

The appellee DCI, relying upon United States v. Pink, 315 U.S. 203 (1942), argues that there is no federal question in this appeal from the decision of the New York Court of Appeals, and that only a state question is involved. United States v. Pink, supra, is not applicable either on the law or on the facts and is distinguishable on both the law and the facts from this case at bar.

The order which was given conclusive effect by the New York Court of Appeals was a non-final order; it was not a final judgment on the merits. Jurisdictional Statement, pp. A17-A19.

The appellee, at page 3 of its motion, quoted a portion of the decision of this Court in United States v. Pink, supra. However, the appellee omitted to include relevant portions of the full quotation which show that it is not applicable to the case at bar. Thus, the full quotation appears as follows:

> First. Respondent insists that the complaint in this action was identical in substance and sought the same relief as the petition of the United States in the Moscow case, and that his answer set up the same defenses as were successfully sustained against the United States by the defendants in that case. He also maintains that both

> parties agreed, on the motion, for summary judgment, that the decision in the Moscow case governed this cause, having no issues to be tried. We agree with those contentions. It is in accord not only with the motion papers, but also with the rulings of the New York Court of Appeals that the Moscow case 'left open no question which has been argued on this appeal'. In view of that ruling we are not free to inquire, as petitioner suggests, into the propriety under New York practice of grounding the motion for summary judgment on the record in the Moscow case. That is distinctly a question of state law, on which New York has the last word. United States v. Pink, 315 U.S. 203, 215, 216 (1942).

The complaint in this action has no counterpart in or to any other complaint by appellee DCI, or any other plaintiff against the same defendant for the same cause. The issues presented by this complaint of appellee DCI against Aetna Casualty and Surety Co. are unique to this complaint of appellee DCI against Aetna Casualty and Surety Co.; they are not "identical in substance and sought the same relief" United States v. Pink, supra, at p. 215, as in any 'prior' complaint, because there was no 'prior' complaint on that or any similar claim by appellee DCI; and, of course, there was no 'prior' answer, and there was no "answer that set up the same defenses". United States v. Pink, supra, at p. 215.

The "propriety under New York law of grounding the motion for summary judgment on a prior adjudicated case", United States v. Pink, supra, is not the issue in this case.

This court, in United States v. Pink, supra, at p. 216, 217, even under the facts in that case, went on to show and to hold that the

> Moscow case is not res judicata, since respondent was not a party to that suit ....Nor was our affirmance of the judgment in that case by an equally divided court an authoritative precedent. While it was conclusive and binding upon the parties as respects that controversy (Durant v. Essex Company, 7 Wall. 107), the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases. Hertz v. Woodman, 218 U.S. 205, 213-214.

The upshot of the matter is that we now reach the issues in the Moscow case insofar as they are embraced in the pleadings in this case. And there is no reason why we cannot take judicial notice of the record in this Court of the Moscow case....

This Court, in United States v. Pink,

supra, at p. 217 thereupon reviewed the case, decided that the "question of foreign law is not to be determined exclusively by the state court", and that "The claim of the United States based on the Litvinov Assignment raises a federal question," and that "This Court will review or independently determine all questions on which a federal right is necessarily dependent." (Underscoring added)

The issue in Pink was whether the New York Court of Appeals could impose a state view which was opposed by and contrary to a federal view on a matter governed exclusively by the federal power. This court held that since the matter was governed exclusively by the federal power, that the federal view must prevail over that of the state view and the state could not decide the issue.

Conclusion

It is respectfully urged that the appellee's motion to dismiss should be denied and that the appellant's petitions should be granted.

Respectfully submitted,

Bernard G. Ehrlich

Dated : September 7, 1976
New York, New York